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No. 401

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHEMICAL BANK NEW YORK TRUST COMPANY, Trustee, Mortgagee,
Petitioner,

v.

Steamship WESTHAMPTON (Formerly Steamship MONTAUK POINT), Her Engines, Boilers, etc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM A. GRIMES,
Counsel for Petitioner,
10 Light Street
Baltimore, Md. 21202

JOHN W. BARNUM,
EDWARD C. KALAIDJIAN,
Of Counsel.

July 29, 1966.

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CHEMICAL BANK NEW YORK TRUST COMPANY, Trustee, Mortgagee, *Petitioner*, *v.* Steamship WESTHAMPTON (Formerly Steamship MONTAUK POINT), Her Engines, Boilers, etc., *Respondent.*	No. 401

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decrees of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cause on April 5, 1965. (65a-66a)

Opinions and Order Below

The opinion of the United States District Court for the District of Maryland (I R. 3), printed in Appendix B hereto, *infra,* at 37a, is reported at 231 F. Supp. 284.[1] The opinion of the Court of Appeals (III R. 4) and the order denying petitioner's motion for rehearing en banc (III R. 381), are printed in Appendix B hereto, *infra,* at 13a and 36a, and reported at 358 F. 2d 574 and 587, respectively.

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[1]The transcript of record is in three volumes: the appendix of appellant below, the appendix of appellees below and the record in the Court of Appeals. Those three volumes are cited herein as I R., II R. and III R., respectively. The record in the District Court has also been certified to this Court.

The pages of the appendices hereto are cited herein as "1a", etc.

Jurisdiction

The opinion of the Court of Appeals was filed on April 5, 1965 (III R. 4; 13a). A timely petition for rehearing en banc was filed on May 5, 1965 (III R. 32) and denied on May 3, 1966 (III R. 381; 36a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1964).

Questions Presented

1. Whether in the interests of justice this Court should review the decision below after Congress has nullified that decision as to all persons other than petitioner.

2. Whether a curative statute, intended to undo a judicial deviation from established law and to validate retroactively existing mortgages first put in question by that judicial deviation, may constitutionally discriminate against the mortgage which gave rise to the statute merely because it was in litigation at the time of the statute's enactment.

3. Whether the federal interest in foreign relations requires this Court to rectify such discrimination, whether it be unconstitutional or merely unfair, when the only victims are foreign investors who, in reliance upon Maritime Administration and Bureau of Customs rulings and opinions, entered into a normal financing transaction which enhanced the value of the American merchant marine.

4. Whether an interpretation of the Shipping Act, 1916, and the Ship Mortgage Act, 1920, which contradicts the originally specified, consistently maintained and recently reaffirmed national maritime policy of encouraging private investment in American-controlled shipping should be permitted to stand when its effects are to nullify a recorded mortgage arranged in accordance with widely followed

Maritime Administration opinions, to expose the mortgagor to criminal liability and the lender to a forfeiture, and to give a windfall to subsequent creditors who had notice of the mortgage lien.

Statutes Involved

The Due Process Clause of the United States Constitution; the relevant provisions of Sections 2, 9 and 37 of the Shipping Act, 1916, 39 Stat. 729, 730 (1916), and 40 Stat. 901 (1918), as amended, 46 U. S. C. §§ 802, 808, 835 (1964); Subsections B and D of the Ship Mortgage Act, 1920, 41 Stat. 1000 (1920), as amended, 46 U. S. C. §§ 911(5), 922(a)(5) (1964); and Pub. L. No. 89-346, 79 Stat. 1305 (1965), are set forth in Appendix A hereto, *infra,* at 1a-12a.

Statement

The mortgage at stake here made possible the conversion of the *S.S. Westhampton* from an outmoded T-2 tanker worth $80,000 to an efficient bulk cargo carrier worth $2,500,000. The vessel was converted for Seatrade Corporation, its U.S. owner, by H.C. Stuelcken Sohn, a Hamburg shipyard which sought financing from Hamburgische Landesbank Girozentrale, a German bank. Landesbank agreed to lend Seatrade 70% of the $1,300,000 payable to the shipyard under the conversion contract on the condition that it receive both a first mortgage entitled to preference under the Ship Mortgage Act and a guaranty of the loan by the shipyard. (14a; III R. 365-66)

Landesbank was advised by American admiralty counsel that its loan to finance the vessel's conversion would qualify for a preference under Section 922(a)(5) of the

Ship Mortgage Act[2] provided the owner of the vessel delivered a mortgage to an American trustee under an indenture securing a bond issued to Landesbank in the amount of the loan (14a). This common financing arrangement was recommended on the basis of long-standing, widely known and widely followed rulings and opinions of the Maritime Administration and the Bureau of Customs (I R. 36-55, 56-80, 144-73, 177-80). An indenture was subsequently executed in August 1962, naming petitioner as trustee-mortgagee, and a bond in the full amount of the loan (approximately $960,000) was issued by Seatrade to Landesbank (14a).

In December 1962, Seatrade failed to make the first payment of principal and interest due to Landesbank on the bond. When Seatrade did not remedy that default, petitioner declared the full amount of the debt to be due and payable and commenced in Baltimore (where the vessel was located) this in rem proceeding to foreclose the mortgage on the *S.S. Westhampton,* pursuant to 28 U. S. C. § 1333 (1964) and 46 U. S. C. § 951 (1964). The Baltimore district court ordered the ship sold to a United States citizen in full compliance with U.S. shipping laws, and the proceeds of $2,551,104.41 were paid into the court registry (15a).

Because Seatrade's liabilities apparently exceed its assets (a bankruptcy petition has been filed) and numerous creditors have asserted contractual maritime liens which would take precedence over a simple mortgage claim, peti-

[2]All references to sections of the Ship Mortgage Act, 1920, 41 Stat. 1000 (1920), as amended, 46 U. S. C. §§ 911-84 (1964) (the "Ship Mortgage Act"), to the Shipping Act, 1916, 39 Stat. 728 (1916), as amended, 46 U. S. C. §§ 801-42 (1964) (the "Shipping Act"), and to other shipping statutes are to the section numbers in Title 46 of the U. S. Code, rather than to the sections of the acts as enacted.

tioner's recovery of the loan to Seatrade depends not only upon the validity but also upon the preferred status of the mortgage under the Ship Mortgage Act.

The district court denied such a preferred status on the novel ground that Section 911(5) was intended to encompass only public bond distributions. The section defines the " 'mortgagee' in the case of a mortgage involving a trust deed and a bond issue thereunder" to be the trustee, but the court said "a bond issue" did not include the issuance of a single bond to a single lender. It held that petitioner was therefore not the mortgagee, that Landesbank, a foreigner, was to be regarded as the mortgagee, and that therefore the mortgage was not entitled to a preference under Section 922(a)(5). The district court noted that Congress, in enacting the Ship Mortgage Act, sought to prevent acquisition of control of American shipping by foreign lenders. The holder of a single bond under a mortgage indenture, the court asserted, possessed the type of control which Congress sought to deny to noncitizens. (62a-64a)

The court of appeals rejected the reasoning of the district court. It pointed out numerous restrictions upon any "control" exercised by the lender: he can initiate a foreclosure only after his demand upon the trustee to foreclose is refused without valid reason; the trustee has the right, indeed the duty, to refuse a demand for foreclosure if it would result in the unlawful transfer of an interest in the ship to a noncitizen; and the trustee has certain duties to the debtor (25a-26a). See 46 U. S. C. § 961(e) (1964). Jurisdiction over the trustee, the court noted, was sufficient to assure that the ship would not be operated in a manner adverse to American interests. In effect, the court of appeals held that petitioner's transaction did not violate either the letter or the spirit of the provisions of the Ship Mortgage Act intended to prevent foreign control of U. S. vessels.

Nevertheless, the court of appeals affirmed the decision of the district court in an opinion which denied the validity—not merely the preferred status—of the mortgage in question. The mortgage would have been "preferred" under Section 922(a) if it were "valid," the court said; but to assess its validity the court looked beyond the Ship Mortgage Act, on which the district court had focused, to the provisions of the Shipping Act. Section 835(b) of the latter act invalidates a "mortgage . . . or . . . transfer, to any person not a citizen of the United States" of any American-owned or documented ship or any "interest" therein during a war or national emergency without the approval of the Secretary of Commerce. The court assumed—incorrectly—that Section 835(b) prohibited transfer of stock in a shipping company to an alien without approval of the Secretary of Commerce and reasoned that Congress intended the same limitations on transfers of bonds. Under real property law, the court also asserted, a bond could be characterized as an interest in the property held in trust. The court reasoned that since Congress in the 1916 Shipping Act and the 1918 amendment thereto intended to prevent alien control of American shipping, the word "interest" in Section 835(b) should be construed to encompass Landesbank's relation to the mortgaged property.

Although the bondholder was not before the court, the court held that the bond was invalid because the mortgagor in 1962, during a period of national emergency declared for the Korean War in 1950, had not obtained the approval of the Secretary of Commerce to issue the bond. The court said that rendered both the bond and the mortgage held by petitioner invalid. The court invalidated the bond for lack of approval notwithstanding the uncontroverted evidence that the Maritime Administration, which is delegated by the Secretary to act in this area, had in the past repeatedly

advised that approval of the issuance of such a bond was not required. In the opinion of the Maritime Administration, a bond was not an "interest" in a vessel. (27a-35a)

Thus the court of appeals found that the Shipping Act prohibited mortgage transactions valid under the subsequently enacted Ship Mortgage Act. But no support was cited for such a difference in purpose or result. Indeed, the ground for the court of appeals' decision had not been fully briefed or argued; it had merely been suggested on the eve of oral argument by the Trustees in Reorganization of Seatrade (III R. 36, 228, 303).

Consequently, petitioner moved for reargument before the Fourth Circuit en banc.

While that petition was before the court below, Congress in response to urgent and widespread appeals from many sectors of the shipping industry enacted Public Law 89-346, which repudiated the basis for the court's decision. 79 Stat. 1305 (1965) ("the 1965 Act").[3] Under the pro-

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[3] "As the Maritime Administration has felt for many years, your committee likewise has been of the opinion that the citizenship of a bondholder under a ship mortgage is not at issue so long as the citizenship of the trustee meets all requirements, and thus a ship mortgage bond issued by a U. S. citizen-trustee is not an 'interest' in a vessel within the meaning of sections 9 and 37 of the Shipping Act of 1916. Nevertheless, in view of the urgent requirement for certainty of financing our ship replacement program, your committee felt it would not be prudent to await final court action before moving to eliminate the doubts raised by the *Westhamption* decision." H. R. REP. No. 1116, 89th Cong., 1st Sess. 5 (1965).

See S. REP. No. 686, 89th Cong., 1st Sess. 2-5 (1965); *Hearings Before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Commerce*, 89th Cong., 1st Sess., ser. 89-36 (hereinafter *"Senate Hearings"*) 17-34, 79-90, 92-96 (1965); *Hearing Before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries*, 89th Cong., 1st Sess., ser. 89-15 (hereinafter *"House Hearing"*) 16-34, 38, 40-51 (1965); 111 CONG. REC. 12726 (daily ed. June 10, 1965); 111 CONG. REC. 26832 (daily ed. Oct. 21, 1965).

visions of that statute, a mortgage indenture to a citizen-trustee approved by the Secretary of Commerce is valid without regard to the citizenship of the lender, and if the trustee meets certain routine requirements set forth in the 1965 Act, the Secretary "shall" approve the trustee (8a).

Moreover, with a single exception, outstanding mortgages were specifically stated to be valid, subject to the new condition that the trustee obtain the approval of the Secretary of Commerce within one year (12a). Petitioner, which is trustee-mortgagee under many ship mortgage indentures (I R. 104, 189), was approved as a trustee on April 6, 1966. 31 Fed. Reg. 5457 (1966).

The single exception, however, is aimed solely at this petitioner: the statute provides that it shall not be construed to "alter retroactively any rights which were the subject matter of litigation pending on the date of enactment of this Act." (12a) Petitioner was the only trustee-mortgagee litigating its rights when Congress was considering and enacting that statute. Congress was fully aware of that fact, and Congress also knew that the only lenders who would be prejudiced by the exclusionary clause are three Germans holding bonds issued under petitioner's trust indentures.[4]

More than one year after its original decision, and six months after the enactment of the curative legislation (which petitioner brought to the court's attention by way of supplementing its petition for reargument (III R. 358)), the court of appeals denied petitioner's motion for reargument en banc. The denial was without opinion, the court

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[4] *Senate Hearings* 89-91; *House Hearing* 36-37. Petitioner is trustee-mortgagee on two other mortgages issued to secure conversion financing on sisterships of the *S.S. Westhampton*. Those mortgages were foreclosed in, and the vessels sold to U. S. citizens by, courts in Bombay and Port Said, where the vessels were located after the owner defaulted. *Ibid.* (See I R. 119-120, 128-29.)

simply noting that it had considered all the additional material brought to its attention (36a).

Petitioner is therefore the only mortgagee to whom this repudiated rule in the Fourth Circuit applies. At the least, petitioner and Landesbank have lost their security to persons who extended credit to the *S.S. Westhampton* or to Seatrade Corporation subsequent to Landesbank and in the face of a recorded and presumably valid first preferred mortgage. In addition, because of the substantial number of other creditors, including the U.S. Government, petitioner and Landesbank stand to recover virtually nothing if petitioner's preferred status is not recognized. Finally, recovery of the loan may be thwarted entirely should the proceeds of sale be forfeited to the United States in the same manner as the vessel itself would have been because of an illegal transfer of an "interest". 46 U. S. C. § 835 (1964).[5]

Reasons for Granting the Writ

1. "[T]he present case now stands completely alone." *Gondeck* v. *Pan American World Airways, Inc.*, 382 U. S. 25, 27 (1965). The invalidation of petitioner's mortgage—which on the basis of prior decisions and administrative practice petitioner had every right to regard as valid—led directly to congressional nullification of the rule enunciated by the Fourth Circuit and still in issue here. Because Congress has acted retroactively while creating an exception as to only this trustee, petitioner's loss is an uncured aberration.

The unfairness of such a result was recognized by this Court in *Gondeck*. There the Fifth Circuit, misinterpreting an earlier Supreme Court decision, had denied the plaintiff

[5]The decision also subjects the mortgagor, Seatrade, to possible criminal sanctions for having conveyed an "interest" in an American ship without the Secretary's consent. *Ibid.* See *House Hearing* 41, 45.

recovery under the Longshoremen's and Harbor Workers' Compensation Act. Certiorari was denied. Thereafter both the Fifth and Fourth Circuits rejected the Fifth Circuit's reasoning in *Gondeck* and awarded damages to others injured in the same accident. As a result, Mrs. Gondeck stood alone in not receiving the benefit of the correct rule of law. That circumstance, this Court said, was sufficient to justify reconsideration of the petition, even though rehearing had been denied three years before. Certiorari was granted and the decision below summarily reversed.

The unfairness with which petitioner has been treated is precisely analogous to that in *Gondeck*. One might say that petitioner alone will suffer from the "accident" in the Fourth Circuit; Congress has made whole the many others injured by the decision below. Indeed, the *Gondeck* decision goes far beyond what is requested here. In that case, this Court concluded that the interests of justice were paramount to any interest in the finality of judgments, which is a policy of far greater weight than the policies which require this Court to limit the grounds upon which it will grant a timely certiorari petition. There the respondent had every reason to rely upon an apparently final decision; here the time is ripe for correcting the error below which would give subsequent creditors a windfall profit.

Similar considerations led Judge Bryan of the Southern District of New York to apply the Hickenlooper Amendment to the *Sabbatino* case on remand. See *Banco Nacional de Cuba* v. *Farr*, 243 F. Supp. 957 (S. D. N. Y. 1965). The decision of this Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964), had given rise to that amendment. Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1013 (1964). In the interests of justice and fair play, the district court refused to construe the statute as not applicable to the same case on remand.

This is not a case where a petitioner's original claim raises constitutional issues which are mooted for all other

persons by a subsequently-enacted statute; there the policy of avoiding unfairness gives way to the policy of avoiding constitutional issues in the absence of a compelling need for deciding them. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70 (1955). Here the issues of constitutionality and fairness arise from the very fact of petitioner's unique treatment by the Congress while the court of appeals was deliberating rehearing. No policy supports the avoidance of such issues merely because they affect only a single party. See, for example, the highly individualistic coerced confession cases recently summarized in *Miranda* v. *Arizona*, 86 Sup. Ct. 1602 (1966).

The issue of invidious congressional discrimination is important to the legal fabric as a whole even if the correct reading of the superseded portions of the Shipping and Ship Mortgage Acts will have no future impact. True, this Court does not "sit for the benefit of particular litigants," *Rice* v. *Sioux City Memorial Park Cemetery, Inc., supra*, 349 U. S. at 74, but to decide "important" federal issues. Supreme Court Rule 19. But importance can not be judged solely or even primarily by the number of persons directly affected. The principle to be vindicated in the present case—equal justice—is fundamental to our legal system. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc., supra*, 349 U. S. at 80 (Black, J., dissenting); *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 125-26 (1955). For this reason, the isolation of petitioner by Congress, acquiesced in by the court below, should recommend, not prevent, review by this Court.

2. When a statute affects substantive rights or alters a rule of law upon which parties are likely to have relied, it will generally be presumed to apply only to transactions undertaken after the statute's passage. A contrary interpretation would raise serious constitutional questions,

particularly where rights under contracts and mortgages are concerned, reliance on existing law being such a significant element in the transaction. See, *e.g.*, *Greene* v. *United States*, 376 U. S. 149, 160 (1964); *Union Pac. R.R.* v. *Laramie Stock Yards Co.*, 231 U. S. 190 (1913); Smead, *The Rule against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 786-87, 794-95 (1936). However, a far different rule of construction is applied to statutes which are intended to fulfill justified expectations by reversing an unanticipated and erroneous judicial declaration of prior law. "Curative" statutes which "merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions" are by their very nature retroactive and are applied to transactions occurring prior to enactment. *McNair* v. *Knott*, 302 U. S. 369, 372 (1937).

Whether such statutes should be construed not to extend to cases pending at the time of enactment has often been litigated. The rule universally applied is that "when a statute is to be retroactively applied to past transactions, it is applied to those involved in pending litigation as well." *Banco Nacional de Cuba* v. *Farr*, *supra*, 243 F. Supp. at 968. See, *e.g.*, *United States* v. *The Schooner Peggy*, 1 Cranch 102 (1801). This rule does "not depend upon the imputation of a specific intention to Congress in any particular statute." *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 313 (1964). Rather, courts applying the rule have often used the language of necessity: "[W]e are bound . . . to consider and apply the amended statute." *Carpenter* v. *Wabash Ry.*, 309 U. S. 23, 29 (1940). *Accord*, *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 201 (1921).

But retroactive legislation that applies to everyone except persons already in litigation may raise "grave" constitutional questions. In *Rice* v. *Sioux City Memorial Park*

Cemetery, Inc., supra, an Iowa statute permitted the recovery of damages for discriminatory denial of the privilege of interment in private cemeteries. However, it also provided that: " 'Nothing in this Act contained shall affect the rights of any parties to any pending litigation.' " 349 U. S. at 76. Three justices, dissenting from the dismissal of certiorari in a case which was in litigation at the time of enactment, found that the statute "raises a new question of denial of equal protection" by providing that "every person in Iowa except one who has already filed a suit can prosecute claims like this." 349 U. S. at 80.

The question here arises under the Due Process Clause of the Fifth Amendment rather than under the Equal Protection Clause of the Fourteenth. However, the Fifth Amendment does assure equality in legal treatment, for a "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954). Nor can this issue be avoided by deeming the benefit conferred by the 1965 Act a "privilege" rather than a "right." Congress could have chosen, of course, not to validate any outstanding mortgages. But having undertaken validation of outstanding mortgages, it may not discriminate against the holders of certain mortgages on an invidious, arbitrary basis. See *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 239 (1957); *Wieman* v. *Updegraff,* 344 U. S. 183, 191-92 (1952).

The distinction between mortgages in litigation on the date of enactment and all other outstanding mortgages not being litigated bears no reasonable relation to the fulfillment of any legitimate legislative purpose. *Cf. Morey* v. *Doud,* 354 U. S. 457 (1957). Congress acted retroactively in order to fulfill the expectations of lenders who assumed they were receiving a valid preference under the law as it was believed to exist. Similarly Congress had no reason or

intention to relieve the borrowers of their debt or to give other creditors a windfall. That policy is equally applicable to mortgages in foreclosure, for the same elements of reliance, a bona fide debt and notice to other creditors are present whether or not foreclosure has taken place. The time of foreclosure is not tied to any change of position; indeed, it is not even strictly a matter of the mortgagee's choice because, as is generally recognized, foreclosure is a step taken only when all other measures have failed. The discrimination in the present case, then, rests on the mere accident of time of arising. A classification defined by time, when the time chosen is unrelated to a legislative purpose, is arbitrary. See *e.g., Mayflower Farms, Inc.* v. *Ten Eyck,* 297 U. S. 266 (1936); *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32 (1928); *Beauty Built Constr. Corp.* v. *City of Warren,* 375 Mich. 229, 134 N. W. 2d 214 (1965); *State* v. *Sunset Ditch Co.,* 48 N. Mex. 17, 145 P. 2d 219 (1944); *State ex rel. Bacich* v. *Huse,* 59 P. 2d 1101, 1104 (Wash. 1936).

Any purported justification for that discrimination based upon a desire to avoid interference with the judiciary is spurious. As has been shown, courts will presume that a curative statute is to apply to pending actions even in the absence of any expressed congressional intent on this issue. Congress should not be permitted to foist an invidious discrimination upon petitioner merely because it wishes to avoid an "imposition" which the judiciary regards as the usual consequence of retroactive legislation.[6]

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[6]By focusing on a narrow class not defined by a legitimate legislative purpose, the 1965 Act operates much like a bill of attainder. An unreasonable deprivation of a benefit may constitute a forbidden bill of attainder. See *Jimenez* v. *Barber,* 226 F. 2d 449 (9th Cir. 1955). *Cf. United States* v. *Lovett,* 328 U. S. 303 (1946); *Peters* v. *Hobby,* 349 U. S. 331, 352 (1955) (Douglas, J., concurring). Nor need there be a finding of vindictive intent on the part of Congress. See *United States* v. *Brown,* 381 U. S. 437 (1965); Comment, 54 CALIF. L. REV. 212 (1966).

Congress' exclusion of petitioner—and of petitioner alone—was arbitrarily discriminatory. The failure of the court below on the petition for rehearing to take the ample hints from Congress that its decision was wrong or to apply the curative provisions of the 1965 Act to petitioner, and instead to honor the discriminatory exclusion of petitioner, resulted in an application of the 1965 Act that is unconstitutional, as well as grossly unfair, and should be reversed by this Court.

3. In recommending the mortgage indenture mode of financing, American admiralty counsel for Landesbank relied upon long-standing rulings of the Maritime Administration and its predecessors which indicated that a mortgage to an American trustee does not come within the strictures of Section 835 of the Shipping Act merely because the bondholder is a noncitizen (I R. 110). Since 1949 Maritime has consistently taken that position in a number of widely known opinion letters issued to parties planning such financing (*e.g.*, I R. 151, 157, 159, 161, 163, 166, 168 and 171).[7] The Bureau of Customs took the same position in regulations and opinions dealing with recordation of preferred mortgages which do not require any determination of the citizenship of bondholders under trust deeds. 19 C. F. R. § 3.37 (1964); I R. 43, 177-79, 183-84. See Memorandum of United States of America, filed in the District Court on April 24, 1964, pp. 29-31.[8] In voiding the mort-

[7]Two early, arguably contrary opinions, the application of which is not clear in part because the facts on which they were based and indeed the questions posed are not known, came to light for the first time only after the district court reopened the record to take additional testimony (I R. 56-57, 59-60, 75-77). Those opinions did relate to Section 961(d), but they assumed that "assignment [of the debt] would carry the mortgage secured by the debt", which is of course not true in the case of an indenture (I R. 174-76).

[8]The Memorandum is volume VIII of the record in the District Court.

gage of the *S. S. Westhampton* because of an unapproved bond issue to a noncitizen, therefore, the court below punished Landesbank for not having sought the approval of an agency which had said repeatedly that its approval was unnecessary.

The United States is thus placed in an embarrassing position, the Congress and the executive branch having in effect induced and facilitated the issuance of a security later invalidated by its courts. This embarrassment is greatly increased by the fact that, under the terms of the 1965 Act, the ultimate burden of the Fourth Circuit's decision will fall on the foreign national secured by the instant mortgage and, if the Port Said and Bombay courts follow the Fourth Circuit, on two other foreign nationals secured by the mortgages on two other vessels. Congress knew full well that those were the only mortgages in dispute when it cured all mortgages not in dispute. See *Senate Hearings* 89-90; *House Hearing* 36-37.

The combination of the decision below (if allowed to stand) and the action of Congress therefore cannot fail to have significant repercussions in international financial markets. To a foreign investor, the conclusions are inescapable —rightly or wrongly—that opinions of U. S. Government agencies are unreliable and that Congress will discriminate against foreign investors if U. S. interests stand to gain. See *Senate Hearings* 37, 61, 63, 74; *House Hearing* 64-67. *Compare* the 1965 Act, which excludes the pending case in which there is a decision *adverse* to foreign nationals, *with* the Hickenlooper Amendment, *supra*, which reverses retroactively across the board, without excluding the case in which the decision in this Court was *favorable* to foreign nationals. Belief in the good faith of the borrower's home country is a great inducement to investment by foreigners. At a time when our Government seeks to encourage such

investment in order to rectify the balance of payments deficit and to develop a merchant marine of the first order, the effect of this isolated yet grievous discrimination should not be underestimated.

Because the decision of the court below affects the substantial federal interest in the maintenance of just and sensible business relations with friendly nations, certiorari should be granted even if the Fourth Circuit rule does not directly affect other potential litigants. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964) (federal interest in foreign relations); *cf. Wilkerson* v. *McCarthy*, 336 U. S. 53 (1949) (federal interest in safeguarding jury trial). The damage to our foreign relations already caused by the reluctance of Congress to disturb certain windfalls created by the decision below should not be compounded by this Court's refusal to rectify the discrimination or to reverse on the merits.

4. As a matter of statutory interpretation and common sense the Maritime Administration was correct in its procedure and the court below clearly wrong. The court found the issuance of a bond under a mortgage indenture to be the transfer of an "interest" in the mortgaged ship within the meaning of Section 835(b) of the Shipping Act (27a-28a). Every step in its reasoning is erroneous.

First, the court's assumption as to the purpose of the Shipping Act is erroneous. The 1916 enactment was aimed at "encouraging, developing and creating . . . a merchant marine to meet the requirements of the commerce of the United States." 39 Stat. 728 (1916). That goal was to be accomplished by stimulating private investment (see, *e.g.*, 53 CONG. REC. 8090, 8327, 12356, 12436 (1916)), while forbidding certain transfers of American vessels to non-citizens. By 1918, the catalog of forbidden transfers had

proven inadequate. Mortgaging to a foreigner had become a common means by which "foreign capital ha[d] sought to obtain *control* of American vessels". 56 CONG. REC. 8026 (1918) (*emphasis added*). Accordingly, Congress proscribed the device. In addition, the unapproved transfer of any "interest" in an American ship was banned to prevent "any arrangement . . . by which the *controlling* interest" might be conveyed to a foreigner. See 56 CONG. REC. 8029, 8032 (1918) (*emphasis added*). When "interest" is defined as a right of *control* over the ship, that provision is consistent with Section 835(d), which forbids any agreement vesting in a foreigner "the controlling interest" of a corporation owning an American ship. See *United States* v. *Niarchos,* 125 F. Supp. 214, 228-30 (D. D. C. 1954). Such an interpretation also comports with congressional intent, for only actual control could affect the use of the vessel in a manner inconsistent with American interests. See 56 CONG. REC. 8037 (1918).

The Shipping Act does not even suggest that a holder of a bond issued under an indenture possesses any degree of control over the mortgaged vessel. Indeed, before the Ship Mortgage Act made mortgages a meaningful security instrument, even an indenture-trustee mortgagee would have had only a very tenuous claim against the vessel since his claim would not have been recognized as a maritime lien. *Bogart* v. *The John Jay,* 17 How. 399 (1854). The holder of a bond issued by the shipping company would have had no claim against the vessel. The Ship Mortgage Act gave to the preferred mortgagee, whether or not he was a trustee, only a lien on the mortgaged vessel and carefully limited his remedies on default. Sections 951-54. To the holder of a bond, the Ship Mortgage Act gave no remedy. Moreover, as the court below recognized, many elements of the debtor-trustee-bondholder relationship deny control to the bondholder, whether or not he is a citizen (25a-26a; see p. 5 *supra*).

Subsequently-enacted statutes also reveal a congressional judgment that a foreign bondholder's limited power poses no threat to the preservation of American control. Thus, the Ship Mortgage Act provides that the mortgagee under a trust deed and bond issue thereunder means the trustee, Section 911(5). Under that Act, only the mortgagee, as defined, need be a citizen. We know that Congress intended that liberal rule because we know that it expressly rejected a test based on bondholder citizenship. *Compare* Section 922(a)(5) *with* "Subcommittee Print" (an earlier draft of the law in which a majority of the bondholders would have been required to be citizens), quoted in *Memorandum of United States of America, supra,* p. 11. See also *Hearings Before the Senate Committee on Commerce Relative to the Establishment of an American Merchant Marine,* 66th Cong., 2d Sess. 2075 (1920). Similarly, the definition of mortgagee under the Merchant Marine Act, 1936, as amended, encompasses the trustee under an indenture but not the "holders of the bonds or notes" issued thereunder. 46 U. S. C. § 1271(d) (1964).

The Ship Mortgage and Merchant Marine Acts were intended to further the same purposes which underlay the Shipping Act, namely, the establishment and preservation of an American-controlled private shipping fleet, while at the same time encouraging and facilitating investment in American shipping by both citizen and noncitizen. The 1920 Act does contain restrictions upon the unapproved transfer of certain interests in a mortgaged ship to a foreigner, similar to those of the Shipping Act. See 46 U. S. C. § 961(d) (1964). However, Congress placed greater emphasis upon the stimulation of private investment than in the 1916 and 1918 Acts. It recognized that the unreliability of secured credit under admiralty law had seriously impeded the inflow of capital, see Gyory, *Security at Sea: A Review of the Pre-*

ferred Ship Mortgage, 31 FORD. L. REV. 231 (1962), and it sought to remedy that defect by establishing adequate maritime security devices—the preferred mortgage in 1920, the insured loan and mortgage in 1936.

In applying the more restrictive provisions of the Shipping Act to security devices created under this subsequent legislation, a court must inquire into the effect of their application upon the later programs. Only in this manner can the common goal which underlies the three statutes be achieved. *Cf. United States* v. *Hutcheson,* 312 U. S. 219, 235 (1941). This is not to treat the provisions of the Shipping Act as being of secondary status. Rather, it is to recognize that in choosing between two possible readings of the earlier act, the effect of decision upon later, related statutes and their purposes cannot be ignored.

The decision below was also contrary to congressional approval of trust indenture financing. That vehicle is expressly sanctioned by the Ship Mortgage Act when the trustee is a citizen.

> "In placing ship mortgages upon a stronger basis as securities, the Congress had in mind, and expressly included, trust deeds securing issues of bonds to the public." *Detroit Trust Co.* v. *The Thomas Barlum,* 293 U. S. 21, 40 (1934).

Because of careful congressional nurturing, the trust indenture device has become "one of the most popular and least expensive forms of ship financing". *House Hearing* 16.

The use of a trust indenture is supported, moreover, by long-standing opinions of the Maritime Administration, the agency charged with making rules delineating both the

Shipping and Ship Mortgage Acts.[9] Those rulings, though not contemporaneous with the enactment of the statutes construed, reflect a sound understanding of the purpose of our maritime legislation. This Court has noted that the weight to be given rulings is "not dependent on strict contemporaneity". *Great Northern Ry.* v. *United States,* 315 U. S. 262, 275 (1942).

The Maritime Administration opinions relied upon by Landesbank's American counsel in advising on this transaction were rendered after the enactment of the Title XI insurance program in the Merchant Marine Act, 1936. Since that statute is relevant to the construction of both the Shipping and the Ship Mortgage Acts, opinions given after its enactment are entitled to greater weight than earlier opinions because the later opinions necessarily reflect the current law as expressed in all three statutes. *Cf. United States* v. *Hutcheson, supra.*

The decision below, therefore, was in no way dictated by the language or legislative history of the Shipping Act, which in fact suggest a contrary result. Rather, the decision contradicted the expressed congressional purpose of encouraging private investment through secured financing and it upset justified reliance upon the rulings of the enforcing agency. Consequently, it was repudiated within six months —even before it became final—by a Congress which believed the law always to have been the other way. See p. 7 and note 3 *supra.*

The second major error in the reasoning of the court below is attributable to the faulty premise that petitioner had legal title to the vessel. The court then equated the "interest" of Landesbank in the *S.S. Westhampton* with the

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[9]Maritime could have granted blanket approval of all such issues and transfers had it considered approval necessary. *E.g.,* 46 C. F. R. §§ 221.4-221.7 (1965). The interpretation of specialized statutes by an administrative agency armed with such discretionary authority is entitled to more weight than it was given by the court below.

interest of a trust beneficiary in a trust res, legal title to which is held by the trustee. (30a)

The premise that petitioner held legal title is contrary to the express provisions of the Ship Mortgage Act and to decisions interpreting that statute. Under Section 951, petitioner held only "a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel." See *The Favorite,* 120 F. 2d 899 (2d Cir. 1941). Section 953 also characterizes the mortgagee's interest as that of a preferred mortgage lien. And in *Detroit Trust Co.* v. *The Thomas Barlum,* 293 U. S. 21, 33 (1934), this Court stated:

> "'The grant is thus one of exclusive jurisdiction to enforce the lien of a 'preferred mortgage.'"

The dubious conclusion that a trust beneficiary has an interest in the trust res (as distinguished from a personal right against the trustee) must fall with the premise that petitioner had title to the vessel.

A third fundamental error of the court below is its adoption of the premise that Congress intended the prohibition of the transfer of an interest in a vessel by Section 835(b) to prevent the transfer to an alien of a single share of stock in a company owning a U. S. vessel, and therefore probably intended also to prohibit the transfer of a bond (29a). That conclusion is erroneous both because the transfer of stock is clearly not prohibited and because bonds do not have the control attributes of stock.

The structure and language of Section 835 contradict the court's premise. Subsection (a) thereof prohibits the transfer of the vessel itself. Subsection (b) prohibits sales, mortgages, leases and charters of the vessel or of interests therein, such actions being transfers of property interests in the vessel. Subsection (c) relates to construction con-

tracts and is not relevant. Subsection (d) prohibits agreements or understandings whereby "there is vested in or for the benefit of any person not a citizen of the United States, the controlling interest or a majority of the voting power in a corporation . . . which owns any vessel". Subsection (b) obviously was not intended to cover transfers of stock; otherwise there would not be any reason for subsection (d).

Moreover, it cannot be argued seriously that Congress intended to require the Secretary of Commerce to review each transfer to an alien of a share of the common stock of American President Lines, for example. Yet that was the court's premise, a premise that had already been squarely rejected in *United States* v. *Niarchos, supra,* which the court below did not even cite.

It is not reasonable to interpret Section 835 as prohibiting a transfer of a bond to an alien when the mortgage and all voting shares could have been transferred to a corporation 49% owned by noncitizens, so long as control of the corporation remained in United States citizens. Both Subsections 835(b) and (d) prohibit transfers to "any person not a citizen of the United States". "Citizen of the United States", in respect of corporations, partnerships and associations, and the ownership by citizens of a "controlling interest in a corporation" are defined in Section 802, and that Section specifically permits ownership of up to 49% of the voting stock by non-U.S. citizens. That provision, making clear that up to 49% of the stock could be held by aliens, was added by the same statute that added Section 835. 40 Stat. 901 (1918).

Notwithstanding the patent absurdity of that premise, the court apparently reasoned that, if Congress intended a share of stock to be an "interest" in a vessel the transfer of which is prohibited unless approved, Congress may also have intended to prohibit the transfer of any bonds unless

such transfer was approved (35a). If the court below is correct that a bond is an interest in a vessel, the transfer of bonds to aliens would be more stringently treated than the transfer of shares of stock. The transfer of shares of stock to aliens is only prohibited in times of national emergency *and* if it constitutes a transfer of control or a majority of the voting power. Sections 808, 835(d).

Although the 1965 Act preserves the trust indenture device, if the decision below is permitted to stand it will cast a continuing pall over construction of the maritime laws and reliance on the practices and opinions of the Maritime Administration. The curative statute does not address itself to the grounds for the court's decision—the literalist interpretation of "interest". Hence, it remains for another court to apply the Shipping Act with similar woodenness to invalidate the conveyance of other noncontrolling interests in American ships, such as a share of stock, or to invalidate maritime liens in favor of aliens for goods and services sold to American vessels on credit. It may also add a woodenness to the activities of the Maritime Administration, notwithstanding the discretion and flexibility with which Congress continues to look to that agency to administer the maritime laws.

This Court should make it clear, therefore, that the Shipping Act is to be read not as an isolated enactment but in the light of subsequent statutes which reaffirm the congressional policy of encouraging investment in American-controlled shipping.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and the decision of the court below summarily reversed or the case remanded for entry of an order that would apply to this mortgage the effect under Public Law 89-346 of the approval of petitioner as a trustee-mortgagee by the Secretary of Commerce.

July 29, 1966.

Respectfully submitted,

WILLIAM A. GRIMES,
Counsel for Petitioner,
10 Light Street,
Baltimore, Md. 21202

JOHN W. BARNUM,
EDWARD C. KALAIDJIAN,
Of Counsel.

APPENDIX A

Constitutional and Statutory Provisions Involved

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SHIP MORTGAGE ACT, 1920

Subsection B, 41 Stat. 1000 (1920), as amended, 46 U. S. C. § 911 (5) (1964).

"**§ 911. Words and terms used in chapter.**

"When used in this chapter—

"....

"(5) The term "mortgagee", in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed."

Subsection D, 41 Stat. 1000 (1920), as amended, 46 U. S. C. § 922 (a) (5) (1964).

"**§ 922. Preferred mortgages.**

"(a) A valid mortgage which at the time it is made, includes the whole of any vessel of the United States

(other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than twenty-five gross tons), shall, in addition, have, in respect to such vessel and as of the date of the compliance with all the provisions of this subsection, the preferred status given by the provisions of section 953 of this title, if—

". . . .

"(5) The mortgagee is a citizen of the United States and for the purposes of this section the Reconstruction Finance Corporation shall, in addition to those designated in sections 888 and 802 of this title, be deemed a citizen of the United States."

SHIPPING ACT, 1916

Section 2, 39 Stat. 729 (1916), as amended, 46 U. S. C. § 802 (a) (b) (c) (1964).

"§ 802. Corporation, partnership, or association as citizen.

"(a) Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case

of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

"(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or, (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

"(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen

of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States."

Section 9, 39 Stat. 730 (1916), as amended, 46 U. S. C. § 808 (1964).

"§ 808. Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coastwise trade.

"Any vessel purchased, chartered, or leased from the Secretary of Commerce, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided,* That foreign-built vessels admitted to American registry or enrollment and license under this chapter, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the Secretary to any person a citizen of the United States, as provided in this chapter, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

"Every vessel purchased, chartered, or leased from the Secretary shall, unless otherwise authorized by the the Secretary, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels,

whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

"Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the Secretary of Commerce, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.

"Any such vessel, or any interest therein, chartered, sold, transferred, or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both."

Section 37, 40 Stat. 901 (1918), as amended, 46 U. S. C. § 835 (1964).

"**§ 835. Restrictions on transfer of shipping facilities during war or national emergency.**

"When the United States is at war or during any national emergency, the existence of which is declared

by proclamation of the President, it shall be unlawful, without first obtaining the approval of the Secretary of Commerce:

"(a) To transfer to or place under any foreign registry or flag any vessel owned in whole or in part by any person a citizen of the United States or by a corporation organized under the laws of the United States, or of any State, Territory, District, or possession thereof; or

"(b) To sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, (1) any such vessel or any interest therein, or (2) any vessel documented under the laws of the United States, or any interest therein, or (3) any shipyard, dry dock, shipbuilding or ship-repairing plant or facilities, or any interest therein; or

"(c) To enter into any contract, agreement, or understanding to construct a vessel within the United States for or to be delivered to any person not a citizen of the United States, without expressly stipulating that such construction shall not begin until after the war or emergency proclaimed by the President has ended; or

"(d) To make any agreement or effect any understanding whereby there is vested in or for the benefit of any person not a citizen of the United States, the controlling interest or a majority of the voting power in a corporation which is organized under the laws of the United States, or of any State, Territory, District, or possession thereof, and which owns any vessel,

shipyard, dry dock, or shipbuilding or ship-repairing plant or facilities; or

"(e) To cause or procure any vessel constructed in whole or in part within the United States, which has never cleared for any foreign port, to depart from a port of the United States before it has been documented under the laws of the United States.

"Whoever violates, or attempts or conspires to violate, any of the provisions of this section shall be guilty of a misdemeanor, punishable by a fine of not more than $5,000 or by imprisonment for not more than five years, or both.

"Any vessel, shipyard, dry dock, shipbuilding or ship-repairing plant or facilities, or interest therein, sold, mortgaged, leased, chartered, delivered, transferred, or documented, or agreed to be sold, mortgaged, leased, chartered, delivered, transferred, or documented, in violation of any of the provisions of this section, and any stocks, bonds, or other securities sold or transferred, or agreed to be sold or transferred, in violation of any of such provisions, or any vessel departing in violation of the provisions of subdivision (e) of this section, shall be forfeited to the United States.

"Any such sale, mortgage, lease, charter, delivery, transfer, documentation, or agreement therefor shall be void, whether made within or without the United States, and any consideration paid therefor or deposited in connection therewith shall be recoverable at the suit of the person who has paid or deposited the same, or of his successors or assigns, after the tender of such vessel, shipyard, dry dock, shipbuilding or ship-

repairing plant or facilities, or interest therein, or of such stocks, bonds, or other securities, to the person entitled thereto, or after forfeiture thereof to the United States, unless the person to whom the consideration was paid, or in whose interest it was deposited, entered into the transaction in the honest belief that the person who paid or deposited such consideration was a citizen of the United States.".

PUB. L. NO. 89-346, 79 STAT. 1305 (1965)

PUBLIC LAW 89-346
89TH CONGRESS, S. 2118
NOVEMBER 8, 1965

AN ACT

To amend sections 9 and 37 of the Shipping Act, 1916, and subsection O of the Ship Mortgage Act, 1920.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 9 of the Shipping Act, 1916 (46 U. S. C. 808), is amended by inserting a new paragraph between the existing third and fourth paragraphs thereof as follows:

"The issuance, transfer, or assignment of a bond, note, or other evidence of indebtedness which is secured by a mortgage of a vessel to a trustee or by an assignment to a trustee of the owner's right, title, or interest in a vessel under construction, to a person not a citizen of the United States, without the approval of the Secretary of Commerce, is unlawful unless the trustee or a substitute trustee of such mortgage or assignment is approved by the Secretary of Commerce. The Secretary of Commerce shall grant his approval if such trustee or a substitute trustee is a bank or

trust company which (1) is organized as a corporation, and is doing business, under the laws of the United States or any State thereof, (2) is authorized under such laws to exercise corporate trust powers, (3) is a citizen of the United States, (4) is subject to supervision or examination by Federal or State authority, and (5) has a combined capital and surplus (as set forth in its most recent published report of condition) of at least $3,000,000. If such trustee or a substitute trustee at any time ceases to meet the foregoing qualifications, the Secretary of Commerce shall disapprove such trustee or substitute trustee, and after such disapproval the transfer or assignment of such bond, note, or other evidence of indebtedness to a person not a citizen of the United States, without the approval of the Secretary of Commerce, shall be unlawful. The trustee or substitute trustee approved by the Secretary of Commerce shall not operate the vessel under the mortgage or assignment without the approval of the Secretary of Commerce. If a bond, note, or other evidence of indebtedness which is secured by a mortgage of a vessel to a trustee or by an assignment to a trustee of the owner's right, title, or interest in a vessel under construction, is issued, transferred, or assigned to a person not a citizen of the United States in violation of this section, the issuance, transfer, or assignment shall be void."

SEC. 2. Section 37 of the Shipping Act, 1916 (46 U. S. C. 835), is amended as follows:

(a) By relettering the existing subsections (c), (d), and (e) as (d), (e), and (f) and by inserting a new subsection (c) as follows:

"(c) To issue, transfer, or assign a bond, note, or other evidence of indebtedness which is secured by a mortgage of

a vessel to a trustee or by an assignment to a trustee of the owner's right, title, or interest in a vessel under construction, or by a mortgage to a trustee on a shipyard, drydock, or ship-building or ship-repairing plant or facilities, to a person not a citizen of the United States, unless the trustee or a substitute trustee of such mortgage or assignment is approved by the Secretary of Commerce: *Provided, however,* That the Secretary of Commerce shall grant his approval if such trustee or a substitute trustee is a bank or trust company which (1) is organized as a corporation, and is doing business, under the laws of the United States or any State thereof, (2) is authorized under such laws to exercise corporate trust powers, (3) is a citizen of the United States, (4) is subject to supervision or examination by Federal or State authority, and (5) has a combined capital and surplus (as set forth in its most recent published report of condition) of at least $3,000,000; or for the trustee or substitute trustee approved by the Secretary of Commerce to operate said vessel under the mortgage or assignment: *Provided further,* That if such trustee or a substitute trustee at any time ceases to meet the foregoing qualifications, the Secretary of Commerce shall disapprove such trustee or substitute trustee, and after such disapproval the transfer or assignment of such bond, note, or other evidence of indebtedness to a person not a citizen of the United States, without the approval of the Secretary of Commerce, shall be unlawful; or".

(b) By inserting a new paragraph between the existing second and third paragraphs thereof as follows:

"If a bond, note, or other evidence of indebtedness which is secured by a mortgage of a vessel to a trustee or by an assignment to a trustee of the owner's right, title, or interest

in a vessel under construction, or by a mortgage to a trustee on a shipyard, drydock or ship-building or ship-repairing plant or facilities, is issued, transferred, or assigned to a person not a citizen of the United States in violation of subsection c of this section, the issuance, transfer or assignment shall be void."

SEC. 3. Subsection O of the Ship Mortgage Act, 1920 (46 U. S. C. 961), is amended by relettering the existing paragraph (e) as paragraph (f) and by inserting a new paragraph (e) as follows:

"(e) No bond, note, or other evidence of indebtedness which is secured by a mortgage of a vessel to a trustee may be issued, transferred, or assigned to a person not a citizen of the United States, without the approval of the Secretary of Commerce, unless the trustee or substitute trustee of such mortgage is approved by the Secretary of Commerce. The Secretary of Commerce shall grant his approval if such trustee or substitute trustee is a bank or trust company which (1) is organized as a corporation, and is doing business, under the laws of the United States or any State thereof, (2) is authorized under such laws to exercise corporate trust powers, (3) is a citizen of the United States, (4) is subject to supervision or examination by Federal or State authority, and (5) has a combined capital and surplus (as set forth in its most recent published report of condition) of at least $3,000,000. If such trustee or a substitute trustee at any time ceases to meet the foregoing qualifications, the Secretary of Commerce shall disapprove such trustee or substitute trustee, and after such disapproval the transfer or assignment of such bond, note, or other evidence of indebtedness to a person not a citizen of the United

States, without the approval of the Secretary of Commerce, shall be unlawful. If a bond, note, or other evidence of indebtedness which is secured by a mortgage of a vessel to a trustee is issued, transferred, or assigned to a person not a citizen of the United States in violation of this paragraph, the issuance, transfer, or assignment shall be void."

SEC. 4. Bonds, notes, and other evidence of indebtedness which are secured by a mortgage of a vessel to a trustee or by an assignment to a trustee of the owner's right, title, or interest in a vessel under construction which have heretofore been issued, transferred, or assigned, or are issued, transferred, or assigned within one year after the enactment of this Act, to a person not a citizen of the United States without the approval of the Secretary of Commerce are valid in the hands of such person and the validity and preferred status of such mortgage and the validity and lawfulness of such issuance, transfer, or assignment shall not be affected by such issuance, transfer, or assignment if the trustee or a substitute trustee is approved by the Secretary of Commerce within one year after enactment of this Act, under the standards for trustees specified in the amendments made by this Act to sections 9 and 37 of the Shipping Act, 1916, and to subsection O of the Ship Mortgage Act, 1920.

Nothing in this section shall be construed to alter retroactively any rights which were the subject matter of litigation pending on the date of enactment of this Act.

APPENDIX B

Opinions and Order Below

1. Opinion of the United States Court of Appeals for the Fourth Circuit, reported at 358 F. 2d 574.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 9637 and 9638

CHEMICAL BANK NEW YORK TRUST COMPANY,
Trustee, Mortgagee, Appellant,

versus

STEAMSHIP WESTHAMPTON (formerly STEAMSHIP MONTAUK POINT), her engines, boilers, etc.,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
ROZEL C. THOMSEN, *District Judge.*

(Argued November 12, 1964. Decided April 5, 1965.)

Before SOBELOFF, *Chief Judge,* and Haynsworth and J. SPENCER BELL, *Circuit Judges.*

SOBELOFF, Chief Judge.

These appeals are from a decree that the first preferred mortgage and indenture dated August 6, 1962, from Seatrade Corporation to Chemical Bank New York Trust Company, is not a preferred mortgage under section 922 of the

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Ship Mortgage Act of 1920. 41 Stat. 1000 (1920), as amended, 46 U. S. C. A. § 922 (Supp. V, 1964).

Seatrade contracted with Struelcken Shipyard of Hamburg, Germany, during 1961, to convert an aged T-2 tanker into a modern bulk cargo carrier. The tanker involved was the SS. WESTHAMPTON, a vessel documented under the laws of the United States at all times relevant to this case. Seatrade paid the shipyard 30% of the conversion cost and sought to borrow the remainder from the Hamburgische Landesbank Girozentrale, a Hamburg bank. The loan was to be secured by a first preferred mortgage on the WESTHAMPTON. American counsel advised Landesbank that such a mortgage to an alien would be valid only if approved by the American Maritime Administration as required by the Shipping Act, 46 U. S. C. A. §§ 808, 835. Furthermore, the bank's counsel pointed out that, even if approved by the Commission, the mortgage would still not be preferred under the terms of the Ship Mortgage Act, 46 U. S. C. A. §§ 911-984, because the proposed mortgagee was an alien. An alternative course was therefore suggested—the debt be secured by a first mortgage in favor of a United States citizen trustee, with a bond for the amount of the loan to be issued to Landesbank. Pursuant to this advice Landesbank requested Chemical Bank New York Trust Company to act as mortgagee and trustee under the trust indenture.

Accordingly, the indenture was executed and the bond issued in New York City on August 6, 1962, the terms of the transaction having been agreed on between Landesbank and Seatrade. The mortgage and indenture were prepared by Landesbank, which does not appear as a party on the face of the papers. The proceeds of the loan, $960,000 (DM 3,836,000), passed directly from the German bank to the German shipyard. It is conceded that Chemical, the Ameri-

can mortgagee-trustee, undertook no more than nominal duties.

A single bond in the full amount of the indenture was executed and delivered to Landesbank. The president of Seatrade, Manuel Kulukundis, gave Landesbank his personal written guarantee of payment of the bond, and Seatrade gave the bondholder ten promissory notes, each in the amount of an installment of principal and interest.

Landesbank has been at all times the owner of the bond. At the closing it gave Chemical a written warranty that the bond was being purchased as an investment with the intention of holding it until maturity. Landesbank then agreed not to dispose of the bond without the consent of Chemical.

Six months later, on January 2, 1963, Chemical informed Landesbank that Seatrade had defaulted in payments due December 31, 1962. Upon failure of Seatrade to remedy the default, Landesbank instructed Chemical to declare the loan due and to take all steps necessary for the protection of Landesbank's interests. On January 14, 1963, Chemical was instructed by the German bank to file the libel which has given rise to this case.

The SS. WESTHAMPTON was sold on March 28, 1963, by order of the District Court to a United States citizen. The sale was confirmed and the net proceeds, $2,551,104.41, were paid into the Registry of the District Court. Chemical's claim to a priority in the proceeds was challenged by objecting creditors on the ground that the indenture did not create a "preferred mortgage" under the Ship Mortgage Act because the holder of the bond secured by the indenture was not a citizen of the United States. The District Court agreed, basing its decision on the finding that Landesbank was the real mortgagee since it had a considerable measure of potential control over the mortgaged property, the SS.

WESTHAMPTON. The exception set out in 46 U. S. C. A. § 911(5), that:

> "The term 'mortgagee,' in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed,"

was held to be inapplicable, the phrase "bond issue" being read by the court to mean a "public bond issue."

We agree with the District Court's conclusion that the mortgage in question is not entitled to the claimed preference, but we arrive at this result by a somewhat different course of reasoning.

I

The debate below revolved round the meaning of the phrase "bond issue" as used in the Ship Mortgage Act, 46 U. S. C. A. § 911(5). Chemical contended that this phrase referred to the issue of bonds, whether to a single investor or to a larger number. Such a reading would make the citizenship of the bondholder irrelevant under the Ship Mortgage Act. The objectors answered that the meaning of "bond issue" is unclear since it could reasonably be understood to refer only to the distribution of bonds to the general public. To clear up the alleged uncertainty, it has been argued below and in this court that an interpretation should be given the term consistent with the statutory purpose of the Ship Mortgage Act. That purpose is then stated by the objecting creditors to be to permit an American trustee to act for a heterogeneous group of bondholders, some of whom might be aliens, but not to permit evasion of the general policy against foreign control. They therefore would limit the reading of section 911(5) to apply to "public" bond issues, with the result that while the Ship Mortgage Act expressly grants a preference to a mortgage held by an American trustee, the objecting creditors read into the

statute a qualification—namely, that the bonds issued under such a mortgage shall be held by not less than some unspecified number of holders. This approach was adopted by the District Court.

We do not share the court's view that the meaning of the phrase "bond issue" was ambiguous when adopted by Congress in 1920. The minimal ambiguity that allegedly exists today is attributable to events occurring since the passage of the Act. No evidence was offered to show that the phrase had any meaning in 1920 other than its literal one, the issue of a bond or bonds. The supposed ambiguity was imported into the statute by the objectors' contention that the phrase might refer to public issues only. The record affords no support for the proposed distinction between public and private issues. The only testimony as to the meaning of "bond issue" in 1920 was that of several bankers called by the appellants. They all testified that "bond issue" was always understood by the financial community to mean the issue of a single or any number of bonds. While the cogency of this testimony may be arguable,[1] the fact remains that it was the only evidence offered on this point.

The District Court nevertheless found an ambiguity by referring to three post-1920 sources, none of which was addressed to the distinction the objectors are urging in this case. The first authority relied on is the *Encyclopedic Dictionary of Business Finance* published by Prentice-Hall in 1960. On page 23 that volume defines "bond issue" as "a class of bonds offered to the public at the same time." The second reference is to the testimony of a witness before the

[1]Not only were these bankers just at the beginning of their careers in 1920, but there is no indication that any factual situation ever arose which required a decision to be made as to the meaning of the phrase "bond issue."

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Merchant Marine and Fisheries Subcommittee in 1954 when that committee had under consideration a proposed amendment to Title XI of the Merchant Marine Act, which provides for government insurance of ship mortgages. The witness, Rudolph Hecht, chairman of the shipowner's committee that proposed the amendment, seemed to assume that a bond issue would involve the interests of a large number of persons. House Hearing on H. R. 8637, p. 18, 83d Cong., 2d Sess. (1954). Thirdly, the following dictum was cited:

> "In placing ship mortgages upon a stronger basis as securities, the Congress had in mind, and expressly included, trust deeds securing issues of bonds to the public." *Detroit Trust Co.* v. *The Barlum,* 293 U. S. 21, 40 (1934).

None of the authorities cited makes a distinction between "public" and "private" issues and all of them can be read to embrace the issue of a single bond to a single member of the "public."

Much of the apparent difficulty in this case is caused by the artificiality of the distinction between "public" and "private" bond issues. The record shows no instance where precisely such a distinction has been drawn. The objectors meet this deficiency by making the distinction themselves, then arguing that the evidence does not clearly show that Congress did not adopt such a distinction. A public-private dichotomy did not exist until Congress made reference to public and nonpublic *offerings* in section 4(1) of the Securities Act of 1933. 48 Stat. 77 (1933), 15 U. S. C. A. § 77d (1958). Congress used the word "issue" to distinguish *classes* of securities and not the number of purchasers. See Loss, Securities Regulation 577, 591 (1961). Thus we fail to find an ambiguity justifying abandonment of the literal meaning of "bond issue"—the issue of a bond or bonds.

As the District Court points out, however, a literal meaning may be rejected if its adoption would frustrate the statutory purpose giving rise to the Ship Mortgage Act. Review of the ends attempted to be accomplished reveals just the opposite, that acceptance of any construction other than the literal one will undercut the congressional purpose. The 1920 Act cannot be understood without reference to earlier history.

At the beginning of the First World War the American ocean-going merchant marine was almost nonexistent. Congress, concerned with the scarcity of domestic shipping, the withdrawal of ships by aliens and inflated freight rates, adopted the Shipping Act of 1916. 39 Stat. 728 (1916), now codified with amendments in 46 U. S. C. A. §§ 801-42 (1958).[2] Congress hoped that the small private merchant marine that did exist could be preserved by insuring that control over American ships would remain in domestic hands. To achieve this end section 9 was adopted, the predecessor of 46 U. S. C. A. § 808. Paragraph 2 of that section provided that no ship purchased from the Maritime Board could be leased, sold or chartered to "any person not a citizen of the United States," without first obtaining the approval of the Secretary of Commerce. Paragraph 3 added that such approval would similarly have to be obtained for the transfer during a war or national emergency of any ship registered under our laws. The Shipping Act of 1916 was thus enacted to preserve what merchant marine we did have.

In the year following the passage of this Act German submarines began to decimate allied shipping. Foreign capital made systematic attempts to replenish their losses by gaining control of American vessels.[3] To thwart such raid-

[2]See House Rep. No. 659, 64th Cong., 1st Sess., 50 (1916).
[3]See House Rep. No. 568, 65th Cong., 2d Sess. (1918).

ing activities Congress added section 37 to the Shipping Act, 40 Stat. 901 (1918), 46 U. S. C. A. § 835 (1958). This section enlarged on paragraph 3 of section 9 by providing that it shall be unlawful during a war or national emergency to do the following without first obtaining the approval of the Secretary of Commerce:

> "(b) To sell, mortgage, lease, charter, deliver, or in any manner transfer * * * to any person not a citizen of the United States, (1) any such vessel or any interest therein * * *."

"Mortgages" were added to the list of restrictions because they had "proved to be a common device by which foreign capital has sought to obtain control of American vessels." 56 Cong. Rec. 8026 (1918). Then in 1920 section 9 of the Shipping Act was amended to extend the added restrictions of section 37 to peacetime transfers of interests in ships documented under the laws of the United States. 41 Stat. 994 (1920), 46 U. S. C. A. § 808 (1958). The Shipping Act, as amended, thus had a positive end and a negative means—it was hoped that our merchant marine might be built up and preserved by preventing its slipping into foreign hands.

At the close of the First World War a new situation arose which gave rise to pressures eventually resulting in the Ship Mortgage Act of 1920. When the war in Europe ended the United States Government owned 1280 ocean-going flag ships. Gilmore and Black, *The Law of Admiralty* 570 (1957). Promptly Congress authorized the dismantling of this fleet and its sale to privately owned shipping lines. H. R. Rep. No. 443, 66th Cong., 1st Sess., 4, 9 (1919). It was soon realized, however, that this result could not be accomplished unless considerable new capital could be attracted to the private shipping industry. To this end the Ship Mortgage Act of 1920 was enacted.

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Investment in shipping has been frustrated over the years by the absence of an effective security device. The common law mortgage was of little use in the shipping industry because it was not considered by admiralty courts to be a maritime contract. This meant that it would be subordinate to all maritime liens whenever they attached. *Bogart* v. *The Steamboat John Jay,* 58 U. S. 399, (1854); see Gyory, *Security at Sea: A Review of the Preferred Ship Mortgage,* 31 Ford. L. Rev. 231 (1962). The Ship Mortgage Act breathed new life into ship mortgages by according them a preference over most subsequently attaching maritime liens. 41 Stat. 1004 (1920), 46 U. S. C. A. § 953 (1958). However, a mortgage was not eligible for this preferred treatment unless the mortgagee was a citizen of the United States, and the term "mortgagee, in the case of a mortgage involving a trust deed and a bond issue thereunder," was defined as "the trustee designated in such deed." 41 Stat. 1000 (1920), 46 U. S. C. A. §§ 922(a) (5), 911 (5) (1958). This citizenship requirement, unlike that of the Shipping Act, was absolute and could not be waived by the Secretary of Commerce.

The essential purpose of Congress in enacting the Ship Mortgage Act was to promote ship financing by affording substantial security to investors. *Merchants & Marine Bank* v. *The T. E. Welles,* 289 F. 2d 188, 193 (5th Cir. 1961). Unquestionably the attractiveness of any investment is diminished when there is uncertainty as to its validity. The Ship Mortgage Act thus speaks in absolutes. Mortgages to noncitizens are put wholly outside the preferential benefits of the Act, but in the case of a bond issue, the citizenship of the trustee is made controlling. A reading of the phrase "bond issue" that incorporates an uncertainty

into the Ship Mortgage Act and seriously impairs marketability should not be favored unless the statutory language makes it unavoidable.

The District Judge was rightly troubled by the many casual references in the legislative history to issues of bonds to large numbers of investors. It must be conceded that bond issues and trust indentures were originally devised to avoid the necessity of issuing a security document to each member of a large group of creditors. One mortgage was executed to a trustee and he held it in trust for all the creditors. *Butler* v. *Bahm*, 46 Md. 541, 546 (1877).

When speaking of bond issues it was only natural that the image evoked was that of a large number of bondholders, but no legal result had ever turned on the number of bondholders under a trust indenture. Though Congress may have assumed unconsciously that large numbers of investors would likely be involved, this assumption was not incorporated into the statute. The objecting creditors offer no feasible rule for determining at what point a "bond issue" is excluded from the meaning of the Ship Mortgage Act because of the diminished number of bondholders.

An argument vaguely similar to that addressed to us in this case was rejected by the Supreme Court in *Detroit Trust Co.* v. *The Barlum*, 293 U. S. 21 (1934). There objecting creditors contended plausibly that a ship mortgage is not eligible for preferred status when the proceeds are used for nonmaritime purposes. The Court held that the intensive anaylsis by Congress when the Ship Mortgage Act was passed and the specificity of the statutory provisions prevented the Court from reading in qualifications not found on the face of the statute.

> "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute * * *. To hold that a mortgage is not within the Act which the Act itself states is within it, is not to construe the Act but to amend it. The question of policy—whether different terms should have been imposed—is not for us. We may not add to the conditions set up by Congress any more than we can subtract from them." *Detroit Trust Co.* v. *The Barlum*, 293 U. S. 21, 38 (1934).

The legislative history of the Ship Mortgage Act does not permit, much less does it compel, the interpretation urged upon us. Extensive references have been made to the hearings and debates preceding the adoption of the Shipping Act and its amendments to show that Congress was concerned with the amount of control that was being exercised over American ships by aliens. This concern led to restrictions on mortgages to noncitizens, and, it is argued, the restrictions would be meaningless if a foreign investor could secure the same objective by taking a bond instead of a mortgage.

It is beyond question that the possibility of alien control was of vital concern to Congress but the legislation primarily designed to meet that evil was found in the Shipping Act, rather than the Ship Mortgage Act. Questions of alien control should be fought out under these statutory provisions where the Secretary of Commerce, acting through the Maritime Administration, is granted the discretion to approve or condemn the control sought in a particular case.

The Ship Mortgage Act comes into play only after the degree of alien control has been determined and there has been approval under the Shipping Act, since only a "valid

mortgage" under the Shipping Act is eligible for preferred status under the Ship Mortgage Act. If the degree of control by the alien is deemed by the Administration not inconsistent with the national interest it will give its approval under the Shipping Act. There is no indication that Congress meant to require a second application of discretion under the Ship Mortgage Act to determine whether the security interest should be preferred, The preference follows if the mortgagee or trustee is an American citizen and the other provisions of the Ship Mortgage Act are met.

The distinction made by the Ship Mortgage Act in respect to citizenship is among security devices that have already met Administration approval as provided by the Shipping Act. The provisions of the Ship Mortgage Act encourage certain investments by aliens, those made as bondholders. Not encouraged are those made by aliens as mortgagees, even if the mortgage has been approved by the Maritime Administration.

The heart of the objectors' contention is that an alien secures almost as much potential control by taking a single bond for an entire issue under a trust indenture as by taking the mortgage directly. If this is true, it is said that there would have been no reason for Congress to encourage one and not the other. The validity of this suggestion turns on the question whether in 1920, when the distinction was made between direct mortgages and bond issues, there was a significant difference between the status of a mortgagee and that of the owner of all the bonds issued under a trust indenture.[4]

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[4]It is conceded that the trust indenture in this case is the standard one and there is no indication that it differs significantly from the trust indentures in use in 1920.

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As bondholder Landesbank is in a less dominant position than it would have been as direct mortgagee, for in that case it could foreclose the mortgage solely on its own initiative. The bondholder, it is true, can also initiate a foreclosure but only after certain conditions have been satisfied. A demand must first be made on the trustee to foreclose. The bondholder may then proceed if the trustee refuses to act, unless the refusal is based on a legitimate reason. The bondholder may not proceed until the validity of the reason has been ruled on by a court. *Nashua Savings Bank* v. *Burlington Electric Light Co.*, 99 *Fed.* 14 (S. D. Iowa 1900).

The trustee has an independent role and is within his rights in refusing to obey a bondholder whose instruction is illegal. *Central Trust Co.* v. *Owsley*, 168 Ill. App. 505 (1914). See also *Huffman* v. *Gould*, 327 Ill. App. 428, 435, 64 N. E. 2d 773, 777 (1946). The Shipping Act makes it illegal for anyone to transfer any interest in an American ship to a noncitizen without the approval of the Maritime Administration. 46 U. S. C. A. §§ 808, 835. The trustee might with impunity refuse to foreclose the mortgage when the potential purchaser of the ship is a noncitizen. Indeed the trustee would be criminally liable if he made a transfer in violation of the statute. His refusal to act would certainly delay the foreclosure, and might entirely prevent the bondholder from foreclosing directly.

The alien as mortgagee is more likely to disregard American law since he is beyond the jurisdiction of American courts. This practical immunity is also important when the American shipowner-debtor is undergoing a judicially supervised reorganization. If a mortgage is held by an American trustee a bankruptcy court, for example, could enjoin the trustee from foreclosing pending an equitable resolution

of the debtor's financial problems. If an alien held the mortgage directly he would be personally beyond the jurisdiction of the American courts, freer to proceed as he alone thought best.

It was also clear in 1920 that a trustee's loyalties were not exclusively to the bondholders. A duty was owed to the debtor as well. *Wright* v. *Chandler*, 180 Ill. App. 476 (1913); *Charles Green Real Estate Co.* v. *St. Louis Mutual House Bldg. Co.*, 196 Mo. 358, 93 S. W. 1111 (1906); *Ashuelot R. R. Co.* v. *Elliott*, 57 N. H. 397 (1874). This dual duty could conceivably frustrate a bondholder's desire for immediate foreclosure and sale when the debtor is trying to work out a plan that will enable him to continue in business.

Finally, bondholders are bound by the good faith actions of the trustee. 4 Cook, *Corporations* 3564 (1923). The decision of a trustee as to the timing of a foreclosure, the maintenance of the secured property or the schedule of payments on the debt could easily conflict with and frustrate the bondholder's desires.

When an investor takes a bond under a trust indenture he gives up some of the power that would be available to him as mortgagee.[5]

We have seen then that in 1920 Congress was acting to some extent with divergent, if not contradictory, motivations. On the one hand it sought to exclude alien interest in American shipping. To achieve this goal the Shipping Act was amended to reaffirm and extend to peacetime the provision adopted during World War I, voiding the transfer of

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[5]There were and are important reasons why a single lender might choose to take a whole bond issue under a trust indenture rather than a direct mortgage. The investor may want to have someone else manage the debt or he may want to make it possible to split up the investment for wider distribution at some time in the future.

"any interest" in an American ship to a noncitizen, unless the transfer was approved. At the same post-war session, however, there was a consensus that investment in American shipping should be encouraged, including investments by aliens. The latter purpose was implemented by the enactment of the Ship Mortgage Act, according a preference to certain maritime mortgages. Mortgages to aliens, even if approved, were not eligible for preference under this latter Act, but "bond issues" to aliens were encouraged. Furthermore, as pointed out in *Detroit Trust, supra,* Congress wished to delineate clearly the area of favored investments so that they would be readily marketable.

We construe the Ship Mortgage Act then to implement this purpose. We hold that the term "bond issue" includes a single bond representing a whole issue to a single investor. The mortgage to Chemical is therefore entitled to preferred status if it is otherwise valid.

II

For a mortgage to be entitled to preferred status under the Ship Mortgage Act, it must first be a "valid" mortgage. 46 U. S. C. A. § 922(a). The trustee in bankruptcy of the Seatrade Corporation contends that the mortgage upon which Chemical is suing was rendered invalid by the issuance of a bond for the amount of the mortgage to Landesbank, an alien bank, without the approval of the Maritime Administration in violation of the Shipping Act. 46 U. S. C. A. § 835(b). That section voids the transfer of "any interest" in an American ship to a noncitizen during a war or national emergency if the transfer is made without the

approval of the Maritime Administration.[6] This contention rests on two assumptions: first, that the bond issued to Landesbank is an "interest" in the SS. WESTHAMPTON; and second, that the transfer of the bond to an alien, illegal because made without Maritime Administration approval, infects the mortgage under which it was issued. We believe that both of these assumptions are justified.

The Shipping Act provides no definition of the term "interest." It was first used in 1918 when section 37, now 46 U. S. C. A. § 835(b), was added. As noted above, Congress was concerned by the continued inroads on American shipping by alien interests. The 1916 restriction forbidding unapproved "sales, leases and charters" of domestic vessels had not proved effective. To plug loopholes that had been discovered in this language Congress added a prohibition against the transfer of "any interest" in an American ship during war or national emergency, unless the transfer was first approved by the Maritime Administration.

The proposed amendment, set out in H. R. 12100, was designed to combat attempts "by every device which legal ingenuity could suggest to evade" the terms of the 1916 Act. 56 Cong. Rec. 8026 (1918). A war was in progress and Congress was in a mood for extreme measures. Congressman Saunders of Virginia, a member of the House committee that had considered the amendment, expressed the sense of the committee:

> "We have sought to make the language used so sweeping and comprehensive that no lawyer, however ingenious, would be able to work out any device un-

[6] A national emergency was proclaimed by the President in 1950. Proc. No. 2914, Dec. 16, 1950, 15 Fed. Reg. 9029 (1950). The proclamation is still in effect.

> der this section to keep the letter, while breaking the spirit of the law." 56 Cong. Rec. 8029 (1918).

Concern was expressed on the floor of the House that the bill as reported out was too restrictive. It was noted that the broad language would restrict a sale to an alien of a single share of stock in a corporation owning an American ship, thus severely damaging the negotiability of such stock. Congressman Saunders, unmoved by the suggestion as to the consequences to negotiability, explicitly answered that the legislation was intended to cover such minority stock holdings. 56 Cong. Rec. 8037 (1918).

The legislative history of the 1918 amendment pointedly demonstrates the extent to which Congress was prepared to go in preventing or at least controlling the degree of any alien interest in American shipping. It also shows the congressional purpose that a share of stock should be considered an "interest" in the property owned by the issuing corporation. No reference was made, however, to bonds covered by a deed of trust secured by a mortgage on an American ship.

The term "interest" can have a variety of meanings. The most precise is the real property usage, an estate in land, that was developed by the English common law. *Ladd* v. *Ladd,* 49 U. S. 9 (1850). The term has also been used to indicate any claim in or upon property. *Ormsby* v. *Ottman,* 85 Fed. 492, 497 (8th Cir. 1898). As we are construing a penal provision we adopt the narrower definition though it is far from clear that Congress employed the term "interest" in a technical sense.

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In a mortgage-trust indenture the property securing the debt is conveyed to a mortgagee-trustee.[7] Chemical thus holds the legal title to the mortgaged property, the SS. WESTHAMPTON. When the bond was issued by the trustee the relation of trustee and cestui que trust arose between it and the bondholder, Landesbank. *York v. Guaranty Trust Co. of New York,* 143 F. 2d 503 (2d Cir. 1944), rev'd on other grounds, 326 U. S. 99 (1945); *Land Title Bank & Trust Co.* v. *Baron,* 341 Pa. 241, 19 A. 2d 62 (1941); *Sprigg* v. *Commonwealth Title Ins. & Trust Co.,* 206 Pa. 548, 56 Atl. 33 (1903). Landesbank's "interest" in the ship is the interest of a trust beneficiary in the property legally held by the trustee. See *O'Beirne* v. *Allegheny & Kingua R.R. Co.,* 151 N. Y. 372, 45 N. E. 873, 875 (1897).

Scholars have long debated whether the beneficiary of a trust has a property interest in the trust res or merely a personal right against the trustee. See, *e.g.,* Scott, *The Nature and the Rights of the Cestui Que Trust,* 1917 Col. L. Rev. 269 (1917); Stone, *The Nature and the Rights of the Cestui Que Trust,* 1917 Col. L. Rev. 467 (1917). The courts have had less trouble with this question. The Supreme Court has held that beneficiaries of a trust have an interest in the property to which the trustee holds legal title. *Senior* v. *Braden,* 295 U. S. 422 (1935); *Brown* v. *Fletcher,* 235 U. S. 589 (1915).

A bondholder is not a general creditor, but has specific rights with respect to the mortgaged property. He is entitled to protection against the unlawful acts of the trustee or others resulting in waste or destruction of his security.

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[7] The mortgage-trust indenture from Seatrade to Chemical provides as follows:

> "[B]y these presents does hereby grant, bargain, sell, remise, release, convey, assign, transfer, mortgage, deliver and pledge, or cause to be granted" the SS. WESTHAMPTON.

Ikelheimer v. *Consolidated Tobacco Co.*, 59 Atl. 363 (N. J. Eq. 1904). He may sue to prevent the impairment of his security without reference to the maturity of his bonds. *Whitmore* v. *International Fruit & Sugar Co.*, 214 Mass. 525, 102 N. E. 59 (1913).

Although a bondholder has less control over the secured property than a direct mortgagee he still possesses a considerable degree of control. The negotiations leading to this mortgage were carried on between the investor and the debtor, here Landesbank and Seatrade. As a general proposition, the trustee must do as he is told by the bondholder unless the instructions are illegal or immoral. The convenience of mortgaging the ship to a trustee should not obscure the fact that the debt secured is that owed to the bondholder.

> "Although the mortgage and its agreements are made to and with the [trustee] yet the promise of the [debtor] is for the payment of money to the holder of the bonds, and it was to furnish security for the performance of that promise that the mortgage instrument was executed and delivered. The bondholders are the beneficiaries of the mortgage or deed of trust, and that instrument contains, in effect, a contract made for their benefit through a trustee as a convenient intermediary." *O'Beirne* v. *Allegheny & Kingua R. R. Co.*, 151 N. Y. 372, 383, 45 N. E. 873, 875 (1897).

In the early years following the enactment of the Ship Mortgage Act the administrative officials seem to have had no doubt that Congress was concerned with alien ownership of bonds. A few years after the First World War the predecessor of the Maritime Administration, the Shipping Board, was asked to rule whether the assignment of a bond

to an alien would violate section 961(d) of the Ship Mortgage Act.[8] The Board, refusing to approve such a transfer, stated:

> "Is it not therefore clear that Congress had in view the prohibition against an interest and a right under a mortgage being assigned either directly or as incidental to the assignment of the debt? It is easy to imagine that a person not a citizen of the United States might acquire all of the bonds secured by a mortgage. It would thus become the owner of the entire interests under the mortgage and obviously such a transaction is the very one which Congress sought to prohibit."[9]

We are led to the conclusion therefore that, both as a general principle and in the contemplation of Congress, a ship mortgage bond is an interest in the ship mortgaged.

The Maritime Administration, however, in several recent opinion letters, has ruled that a bond is not an "interest" in the mortgaged ship and that it will therefore not exercise its discretion in determining whether the particular bond issue is permissible.[10] This position has been

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[8]"No rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the Secretary of Commerce." 46 U. S. C. A. § 961(d).

[9]Letter of January 2, 1924, from Chauncey G. Parker, General Counsel, addressed to Messrs. Squire, Sanders & Dempsey, The Leader-News Building, Cleveland, Ohio. A similar ruling was made in a letter of April 6, 1927, from Chauncey G. Parker, General Counsel, addressed to Messrs. Denegre, Leovy & Chaffe, 724 Whitney Central Building, New Orleans, Louisiana.

[10]See, *e.g.*, letter from E. Robert Seaver, General Counsel, to Charles S. Cunningham, One Twenty Broadway, New York 5, New York, May 11, 1959; letter from James L. Pimper, General Counsel, to Robert E. Kline, Jr., Munsey Building, Washington 4, D. C., October 19, 1960.

taken without any apparent consideration of the legislative history of the Shipping Act or the Shipping Board's earlier ruling under 46 U. S. C. A. § 961(d). Complete reliance was placed on the definitional section of the Ship Mortgage Act, 46 U. S. C. A. § 911(5), which, as we have seen, defined "mortgagee" as the trustee where there is a deed of trust and a bond issue. Such an analysis is fallacious and completely unwarranted.

First, the definitions found in 46 U. S. C. A. § 911(5) refer only to terms used in the Ship Mortgage Act. Second, the term defined by 46 U. S. C. A. § 911(5) is "mortgagee"; the disputed word in the Shipping Act is "interest." Third, the definition of "mortgagee" in the Ship Mortgage Act was adopted two years after the insertion of the term "interest" into the Shipping Act. Fourth, the Shipping Board, when construing section 961(d) of the Ship Mortgage Act, did not indicate that section 911(5) affected in any way its exercise of discretion in determining whether to permit the assignment of bonds to noncitizens. See *supra*, at p. 21.

The only possible explanation for the later policy of the Maritime Administration is its unconscious assumption that 46 U. S. C. A. § 911(5) of the Ship Mortgage Act impliedly amended the Shipping Act to delete the interest of a bondholder from those interests requiring approval. There is no indication in the legislative history that such a result was intended. Implied amendment is not favored if two pieces of legislation can be reconciled. We have already seen that such a reconciliation is both possible and rational: Transfers of bonds to aliens must first be approved by the Maritime Administration. If approval is given and there is an American "mortgagee" the mortgage is eligible for pre-

ferred status under the Ship Mortgage Act. In adopting the Ship Mortgage Act in 1920 the endeavor of Congress was to avert foreign control while encouraging private investment, whatever the nationality of the investor. Mortgages to aliens were not encouraged because they were thought to involve too much potential control. Yet it was believed that in selected cases some mortgages in alien hands might safely be permitted to take an unpreferred status. Bond issues, however, presented more variables than mortgages. There might be one bondholder or the holdings might be diffused among a thousand, the control exercised by each bondholder varying accordingly. If the Maritime Administration approved the bond issue then the mortgage securing it was eligible for a preference if the mortgagee was an American citizen.

The effect of an unapproved, hence illegal, bond issue on the mortgage to the trustee is a less troublesome question. The debt is represented by the bond; the trustee only holds the mortgage for the protection of the bondholder. Chemical has no personal interest in the mortgage. The mortgage and the bond represent one loan. If one falls, so does the other.

Chemical argues that great weight should be given to the recent attitude of the Maritime Administration that bonds are not interests in the ship mortgaged. While it is true that courts, as a general rule, pay great deference to administrative decisions they do so only for certain compelling reasons.[11] Many of those reasons are not present in this

[11]The weight given a decision of an administrative agency "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (Jackson, J.).

case. The recent rulings were not an exercise of quasi-legislative discretion vested by statute in the Administration. They were interpretations of statutory language. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 134-135 (1936). They were not substantially contemporaneous with the passage of the Act, see *United States* v. *American Trucking Ass'ns, Inc.*, 310 U. S. 534, 549 (1940), nor are they representative of a long standing agency practice. See *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84 (1932). The overruling of decisions facing in the opposite direction, made during the 1920's, was not based upon a re-examination of the underlying facts and policies that should be considered a part of the legislation construed. *National Labor Rel. Bd.* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 68 (3d Cir. 1952). In any event, the alien lender in this case did not ask the Maritime Administration to approve the issuance of the bond.

We recognize the resulting embarrassment when an administrative body, misinterpreting a statute, declines to exercise its lawful jurisdiction. A court, however, for the reasons above stated, may not, in the present circumstances, ignore the statute's command. Being invalid the mortgage is not entitled to the claimed preference.

The order of the District Court is *Affirmed*.

Appendix B

2. Order of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing en banc (III R. 381), reported at 358 F. 2d 587:

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 9637 & 9638

CHEMICAL BANK NEW YORK TRUST COMPANY,
Trustee, Mortgagee,
Appellant,

versus

STEAMSHIP WESTHAMPTON
(formerly Steamship Montauk Point), her engines, boilers, etc.,
Appellee.

ORDER

The court having fully considered the petition for rehearing en banc, the replies thereto and numerous supplemental memoranda and responses, the petition is hereby denied.

FILED
May 3, 1966

Maurice S. Dean
Clerk

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

/s/ SIMON E. SOBELOFF
United States Circuit Judge

/s/ HERBERT S. BOREMAN
United States Circuit Judge

/s/ J. SPENCER BELL
United States Circuit Judge

/s/ ALBERT V. BRYAN
United States Circuit Judge

Appendix B

3. Opinion of the United States District Court for the District of Maryland, reported at 231 F. Supp. 284.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Admiralty No. 4451

CHEMICAL BANK NEW YORK TRUST COMPANY,
versus Trustee, Mortgagee,
STEAMSHIP WESTHAMPTON (formerly steamship Montauk Point), her engines, boilers, etc.

June 11, 1964

THOMSEN, Chief Judge.

This libel in rem against the Steamship Westhampton, her engines, boilers, etc., was filed on January 14, 1963, by Chemical Bank New York Trust Company, Trustee (Chemical), to foreclose what purports to be a first preferred mortgage on the vessel. The validity of the mortgage was questioned initially by the owner, Seatrade Corporation (Seatrade), but its objections were withdrawn before the entry of the order of sale. The vessel was sold on March 28, 1963, for $2,602,000, the sale was confirmed, and the Marshal has paid the net proceeds of sale, amounting to $2,551,104.14 into the Registry of the Court.

Pursuant to orders permitting interested parties other than the owner to contest the validity of the mortgage, sev-

eral intervening libelants who assert liens on the vessel have challenged its validity.[1]

The issue is whether the so-called "First Preferred Mortgage and Indenture" (the mortgage) dated August 6, 1962, from Seatrade to Chemical, as Trustee, meets all the tests of a "preferred mortgage" set out in the Ship Mortgage Act, 46 U. S. C. A. 911 et seq., particularly the requirement of sec. 922 (a) (5) that the mortgagee be a citizen of the United States. Chemical is a citizen of the United States. Hamburgische Landesbank Girozentrale (Landesbank), a corporation of Hamburg, Germany, the holder of the only bond issued under the deed of trust, is not a citizen of the United States.

Contentions of the Parties

Chemical relies on sec. 911(5), which provides: "The term 'mortgagee', in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed." Chemical's principal argument is that the mortgage involves a trust deed and a bond issue thereunder, that Chemical is the trustee designated in the deed and is therefore the mortgagee, and that the citizenship of Landesbank is immaterial.

Objectors contend that the term "bond issue", as used in sec. 911(5), means a public issue of bonds, and not a private issue or placement, where there is only one lender and bond-

[1]The Objectors include the Trustees of Seafarers Vacation Plan, Caltex (Overseas) Ltd., Texaco, Inc., Fertex Steamship Corporation and International Maritime Suppliers Company, Ltd. The alleged liens of some of these Objectors have been challenged by Chemical, but that challenge is not presently before the Court. William Krause, Jr., a personal injury claimant, contends that his claim is superior to the mortgage, admittedly a sound contention if his claim is valid. 46 U. S. C. A. 953.

holder; they argue that this construction of the Act is supported by the legislative history of the relevant statutes and by the early administrative rulings; and that it would thwart the purpose of the Act to permit a single alien lender, who could not qualify as a mortgagee, to use the device of a trust indenture and a single bond to circumvent sec. 922(a) (5), especially where the indenture gives the lender so great a measure of potential control as is given by the indenture in this case.[2]

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[2]Objectors argue that the ordinary meaning of the term "bond issue" is so clear that there is no need for consulting the legislative history; but that if the meaning is not so clear, the legislative history shows that Congress wanted control of the vessels covered by the Act to remain in United States citizens, and made various provisions to that end; that sec. 922(a) (5), requiring that mortgagees be citizens of the United States, was included in the Act because of a mortgagee's potential control, and because mortgages had theretofore been used as a device to obtain control of American vessels; that sec. 911(5) was included in the Act to provide for public bond issues, where there are numerous bondholders, and to prevent possible forfeiture of the vessel under other provisions of the statutes if some of the bonds fall into the hands of aliens by inheritance or purchase; and that the rulings of the General Counsel of the Shipping Board, the predecessor of the Maritime Administration, made during the 1920's, shortly after the adoption of the Act, support the position taken by Objectors.

Chemical replies that the ordinary meaning of "bond issue" includes private issues as well as public issues; that the purpose of Congress in providing that mortgagees must be citizens does not require that bondholders also be citizens; that this conclusion is supported by recent rulings of the Maritime Administration and the Bureau of Customs; that a requirement that the bondholder be a citizen would undercut the purposes of the Ship Mortgage Act and the other statutes designed to foster the merchant marine; and that the mortgage and indenture in this case reflected a normal commercial transaction, not an attempt to evade the spirit of the law, and did not give Landesbank control of the ownership or operation of the vessel.

At the invitation of the Court, the government has appeared as amicus curiae and has filed a memorandum. The first five sections, submitted by the Department of Justice and the Maritime Administration (Maritime) contain a helpful review of the relevant statutes and legislative history. The sixth section presents the arguments of Maritime, which support generally the position taken by Chemical. The Department of Justice takes no position on the merits of the case.

Appendix B

Facts

Most of the facts have been stipulated, many exhibits have been filed, testimony has been taken, and the questions involved have been fully briefed and argued.

The SS Westhampton, a T-2 tanker, was converted to an ore carrier at the Stuelcken Shipyard in Hamburg, Germany, under a contract dated August 21, 1961, between the predecessor in interest of Stuelcken and Manuel E. Kulukundis, to whom Seatrade is successor in interest. The work was completed about August 1, 1962, but some months before that date Seatrade, which had become the owner of the vessel, indicated a desire to pay Stuelcken only 30% of the contract price in cash, the balance to be secured by a mortgage on the vessel. Stuelcken was a customer of Landesbank, a West German corporation with no place of business in the United States, and Landesbank agreed to finance the credit.

In May or June, 1962, Landesbank, which was a correspondent of Chemical, requested Chemical to act as "mortgagee-trustee" under a proposed preferred ship mortgage on the vessel. The reason for this request was that Landesbank was not a United States citizen and therefore could not qualify as a mortgagee under the Ship Mortgage Act, whereas Chemical could. 46 U. S. C. A. 922(a) (5). Chemical agreed, and the original draft of the mortgage was prepared by New York attorneys for Landesbank. The Court finds as a fact that no economic or business reason affected the decision to use the form of transaction which was adopted in this case. The closing was held in New York on August 6, after Albrecht Roscher, a German attorney in the employ of Landesbank, had come to New York with

a power of attorney from Landesbank to sign documents on its behalf.

Upon execution of the mortgage on August 6, Landesbank set up a deposit in favor of Stuelcken in the amount of 70% of the shipyard's bill. Seatrade acknowledged receipt of the consideration for the mortgage by letter to both Landesbank and Stuelcken. It is stipulated that so far as Chemical knows, Landesbank dispensed the proceeds of the loan to Stuelcken in part payment of the latter's charges to Seatrade for the conversion of the Westhampton. Stuelcken confirmed to Seatrade that the deposit had been set up in Landesbank at Seatrade's request. The proceeds of the loan did not pass through Chemical's hands and never left Germany.

A single bond in the full amount of the indenture, DM 3,836,000 (equivalent to approximately $960,000, but payable in German funds) was executed by Seatrade, authenticated by Chemical, redelivered to Seatrade and then delivered to Landesbank by Seatrade. At the same time Kulukundis, president of Seatrade, gave Landesbank his personal written guarantee of payment of the bond. Seatrade also gave Landesbank ten promissory notes, each in the amount of an instalment of principal and interest, guaranteed by Kulukundis. There was a written agreement protecting Seatrade and Kulukundis against having to pay both the bond and the notes.

Landesbank has at all times been the owner of the bond. At the closing on August 6, Landesbank gave Chemical a written warranty that it was purchasing the bond for its own account as an investment, with the intention of holding the same until maturity, and agreed that it would not dispose of the bond or any portion thereof without Chemi-

cal's consent. Such consent has never been requested or given. The bond was registered in the name of Landesbank as to both principal and interest. The indenture permitted multiple bonds not exceeding DM 3,836,000, but that is the usual practice even when it is intended that only a single bond will be issued initially. Landesbank never contemplated that its bond would be split into lesser denominations.

The bond was not registered under the Securities Act of 1933, because it was clearly exempt from registration as not "involving any public offering" within the meaning of sec. 4(1) of that Act.

The Westhampton is a vessel of the United States, as that term is used in the Ship Mortgage Act, 46 U. S. C. A. 911 et seq. The mortgage was duly endorsed upon the vessel's document on August 6, 1962, as required by sec. 922(a)(1), and was recorded on the same day in the manner provided in sec. 921, as required by sec. 922(a)(2).

The mortgage indenture contains a number of clauses, customarily included in such documents, which give a considerable measure of control to Landesbank as the sole bondholder. Sec. 4.1 provides that in case any one or more of the specified "events of default" shall occur and be continuing, "then and in each and every such case the trustee may, and upon written request of the majority in principal amount of the bonds shall," inter alia: 4.1(4), take and enter into possession of the vessel at anytime wherever the same may be, without legal process, and lease, charter, operate or otherwise use the vessel, accounting only for the net profits, if any, arising from such use; and 4.1(5), if it seems desirable, sell the vessel at any place and in such manner as the trustee may deem advisable, after specified notice, without a court proceeding. Most importantly, sec.

4.2 provides: "* * * At any such sale, any holder of any Bonds may bid for and purchase such property and upon compliance with the terms of sale may hold, retain and dispose of such property without further accountability therefor." Sec. 4.9 provides that after an event of default, the ship owner can cure the events of default only if the bondholders consent. Under sec. 5.5 the trustee may be removed at any time by the bondholder, but under sec. 5.4 any successor trustee must be a citizen of the United States within the meaning of the Act.

On January 2, 1963, Chemical cabled Landesbank that Seatrade had defaulted in sinking fund and interest payments due December 31, 1962. On January 11 Landesbank instructed Chemical to declare the loan due. Chemical did so by letter to Seatrade dated January 14. Pursuant to cabled instructions from Landesbank, Chemical filed the libel in this case on January 14. Landesbank thereafter advanced to Chemical funds to cover expenses incurred in preserving the vessel while it was in the Marshal's custody. The vessel was sold under court order on March 28, 1963, and the proceeds have been paid into the Registry of this Court.

Applicable Statutes

The Ship Mortgage Act was enacted as part of the Merchant Marine Act of 1920, which dealt with a great variety of maritime problems. The purpose and policy of the Act were stated in its first section, which, slightly modified, is now 46 U. S. C. A. 861.[3]

[3] 46 U. S. C. A. 861 reads as follows: "It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to

That purpose is similar to the purpose of the Shipping Act, 1916,[4] which contained a number of provisions, still in effect, confining ownership and control of American-flag vessels to citizens of the United States. Sec. 2 (46 U. S. C. A. 802 and 803) prescribes the requirements for corporations, partnerships or associations to qualify as citizens of the United States.[5] Sec. 9 (46 U. S. C. A. 808) makes it unlawful, without the approval of the Secretary of Commerce, "to sell, mortgage, lease, charter, deliver, or in any manner transfer" to any person not a citizen of the United States any vessel or any interest there-

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carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this act, the Federal Maritime Board and the Secretary of Commerce shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained."

[4]As stated in its preamble, the purpose of the Shipping Act, 1916, 46 U. S. C. A. 801-842, 39 Stat. 728, is "To establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes."

[5]The Shipping Act definition of "citizen of the United States" does not completely exclude alien participation in American shipping. If control is vested in citizens, aliens may own up to 49% of the stock of corporations operating in the foreign trade and 25% of the stock of corporations operating in the coastwide trade. Also, in recent years there has been some relaxation of other requirements; e. g., in 1958 Public Law 85-902, 72 Stat. 1736, 46 U. S. C. A. 883-1, permitted operation of certain vessels in the domestic trade by owners who did not qualify as citizens under the 1916 Act; and in 1959, Public Law 86-327, 73 Stat. 597, 46 U. S. C. A. 802, relaxed the requirement for citizenship of corporation directors.

in owned in whole, or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States; subjects the vessel or any interest therein to forfeiture in case of a violation; and prescribes a criminal penalty for those who violate the requirements.[6]

The legislative history in notes 5 to 9 will be discussed below under the heading "Legislative History".

The prohibition against mortgages to aliens was first inserted in sec. 37 in 1918. It was explained by Mr. Alexander, Chairman of the House Committee on Merchant Marine and Fisheries, as follows (56 Cong. Rec. 8026):

> "Not only sales and charters to foreigners, but mortgages to foreigners, without the consent of the Shipping Board, are made unlawful. This is because

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[6] In the debates on the 1918 amendment, 67th Cong., 2d Sess., June 5-28, 1918, Cong. Rec. Vol. 56, pp. 8029, 8032, 8033, Congressman Saunders said, p. 8029: "* * * The amendment intends to make it impossible for any arrangement to be effected by which such a corporation, partnership, or association shall be a citizen of the United States, when the real control of same is in the hands of aliens. We have sought to make the language used so sweeping and comprehensive that no lawyer, however ingenious, would be able to work out any device under this section to keep the letter, while breaking the spirit of the law." Again, at p. 8029, Mr. Edmonds: "I would like to call attention to the fact that in the testimony of the attorney for the Shipping Board he called attention to the fact that some law firms in New York City who represented people abroad would buy a ship and all the stockholders would be the members of this law firm, the stock being held in trust for foreign clients. As I understand it, this is to get around that arrangement." Mr. Saunders: "It seemed to the committee that the plan referred to by the gentleman from Pennsylvania might circumvent the purpose of the original act. Hence the amendment to afford a remedy for a possible weakness in that act * * * if such a scheme as the gentleman from Pennsylvania suggests, was sought to be worked out, it would not only be in fraud of the law, but would be inoperative, since it would be an arrangement by a contract, or understanding for the majority of the voting power to be exercised in behalf of some one not a citizen of the United States."

a mortgage has proved to be a common device by which foreign capital has sought to obtain control of American vessels."

The prohibition, now 46 U. S. C. A. 808, was enacted along with the Ship Mortgage Act as part of the Merchant Marine Act of 1920.[7] While the Ship Mortgage Act was generally concerned with facilitating the private financing of vessels, its immediate objective was to provide a basis for financing the disposal by the Government of war-built tonnage authorized under the Merchant Marine Act of 1920.[8]

The legislative history of the Shipping Act, 1916, and of the Ship Mortgage Act, 1920, does not disclose any specific statement that Congress intended either to permit or to exclude investments by aliens in bonds issued under trust deeds secured by mortgages to citizen trustees. There are instances in the legislative history of the Ship Mortgage Act, 1920, however, indicating concern over vessels being transferred alien as a result of mortgages being held by

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[7]At the hearings before the Senate Commerce Committee on the Establishment of an American Merchant Marine, 66th Cong., 2d Sess., at p. 963, Senator Calder said: "If this mortgage is sold to an Englishman and the vessel is there, will not the English law govern, under the principle that the remedy follows the law of the place?

"(Mr. Campbell) I do not know. * * *

"(Senator Calder) * * * The reason I asked it is I have very large experience in making and assigning mortgages on real estate.

"(Mr. Campbell) I have no objection to putting in this bill, if you want to, that no mortgage shall be assigned to an alien. That will meet your situation?

"(Senator McNary) That is the only way you can meet it.

"(Senator Calder) That is the only way you can meet it."

See also op. cit. p. 1042.

[8]The development of the Ship Mortgage Act, 1920, and particularly of sec. 911(5) may be traced through the following legislative history: 66th Cong., 2nd Sess., H. R. 10378; S. 3882; modified H. R. 10378, following H-S conference; see also H. R. 1093, 1102, 1107; H. R. 12787, and Confidential Subcommittee Print of H. R. 12787.

aliens and the foreclosure of mortgages in foreign countries.[9]

The Ship Mortgage Act, as amended, is now codified as ch. 25 of Title 46, U. S. C., 46 U. S. C. A. 911-984. Sec. 922(a) provides that a mortgage on a vessel of the United States shall have the status of a preferred mortgage if five requirements are met. The only dispute in this case is about the fifth requirement that the mortgagee be a citizen of the United States. It appears from the stipulation and the evidence that all other, formal requirements of sec. 922 have been met.

As noted above, sec. 911(5) provides:

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[9]These statements include, in addition to those set out in note 7;

"(Senator Calder) Suppose I loaned money on an American ship and then I sold (sic) [mortgaged] that ship to a foreigner, and that foreigner foreclosed the mortgage. Would not that ship then pass into the control of the country of which he was a citizen?

"(Mr. Campbell) I can not answer that question, for the reason that if he was going to foreclose and he foreclosed in the United States courts, under the terms of the Shipping Board act, he, a foreigner, might not be able to obtain a transfer of the flag. If he attempted to foreclose the mortgage in England—I doubt whether he could foreclose that mortgage in England—under this bill, because jurisdiction for foreclosure is restricted to the United States courts, but if he did, he would not pass an indefeasible title, except in accordance with the procedure in this bill. I do not know whether he would acquire the right of transfer of the flag or not. * * *

* * *

"(Senator Calder) If this mortgage is sold to an Englishman and the vessel is there, will not the English law govern, under the principle that the remedy follows the law of the place?

"(Mr. Campbell) I do not know; you have asked me a pretty big legal question; I can not answer. If you will give me as much time to prepare my answer as somebody did to prepare the question I will try to answer it."

(Hearings Senate Commerce Committee on the Establishment of an American Merchant Marine, 66th Cong., 2d Sess., pp. 960, 961, 963, 964 (1920).)

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> "The term 'mortgagee', in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed."

The foreclosure provisions of the Act are set out in secs. 951-954.

The provisions prohibiting transfer to an alien of any rights under a mortgage appear in sec. 961. Sec. 961(d) and (e) read as follows:

> "(d) No rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the Secretary of Commerce. Any assignment in violation of any provision of this chapter shall be void.
>
> "(e) No vessel of the United States shall be sold by order of a district court of the United States in any suit in rem in admiralty to any person not a citizen of the United States."

Discussion

1. Ordinary Meaning of "Bond Issue"

The term "bond issue" is not defined in the Ship Mortgage Act. The evidence does not clearly establish that in 1920[10] or in 1962[11] the term "bond issue" was commonly understood either to include or to exclude a private placement or private issue where there was only one bondholder. The terms "private placement" and "private issue" are sometimes used interchangeably; the evidence indicates that the term "private issue" is often used to include any issue where there are not more than ten bondholders.

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[10]When the Act was passed.
[11]When the mortgage was made.

Appendix B

Chemical has offered testimony that in the financial community the term "bond issue" is generally understood to include private issues and private placements whenever there is a trustee and a deed of trust with one or more bonds issued thereunder. The witnesses also testified that this was the generally accepted meaning in 1920. Their testimony is weakened, however, by the incredibly broad meaning two of the witnesses gave to the term, and by the fact that private issues and private placements were not so common in 1920 as they have become since the adoption of the Securities Act of 1933.

On the other hand, there is authority supporting Objectors' contention that the term "bond issue" ordinarily has a narrower meaning. The Encyclopedic Dictionary of Business Finance, Prentice Hall (1960), p. 73, defines "Bond Issue" to mean: "Class of bonds offered to the public at the same time. All the terms and conditions of the bond issue are set forth in the trust indenture". At the hearings on the 1954 Amendments to Title XI of the Merchant Marine Act, dealing with Federal Ship Mortgage Insurance, which will be discussed more fully below under the heading "Legislative History", Rudolph Hecht, Chairman of the Committee of American Steamship Lines, who was sponsoring the bill, said:

> "The bond issue is really your second step. The shipowner or builder goes out and borrows $10 million in one lump, and it may well be that Metropolitan Life, or John Hancock, or the New York Life, would be glad to keep the whole loan, and that is all there is to it.
>
> "But on the other hand, if they fix a rate which is higher than some investment house would be

> willing to take it on for, and that investment house would then say, 'All right. I will give you the $10 million and you make it payable to a trustee and I will split it up into small units and sell some of it to pension funds, and some of it to savings banks, and some of it to the individual investors in thousand dollar pieces, and then it may become a bond issue.' It is entirely flexible." House Hearing on H. R. 8637, p. 18, 83rd Cong., 2nd Sess. (1954).

The adjudicated cases do not furnish a clear definition. In *Detroit Trust Co.* v. *The Thomas Barlum,* 293 U. S. 21 (1934), discussing related problems under the Ship Mortgage Act, the Supreme Court said: "In placing ship mortgages upon a stronger basis as securities, the Congress had in mind, and expressly included, trust deeds securing issues of bonds to the public." 293 U. S. at 40. The Court did not refer to private issues. On the other hand, in *Moon Engineering Co.* v. *American Steamship Valiant Power,* E. D. Va., 214 F. Supp. 555 (1963), Judge Hoffman held that the term "bond issue", as used in sec. 911(5), is not limited to a "public" bond issue. Judge Hoffman quoted from *The Thomas Barlum,* but failed to refer to that portion of the opinion which is quoted above. The other cases cited by Chemical and by Objectors on this point are not particularly helpful.[12]

In McLouth Steel Corp. v. *United States,* Ct Cl., 319 F. 2d 167 (1963), a case not under the Ship Mortgage Act, but cited by Chemical in support of the proposition (with

[12]Cf. *Parsons* v. *City of Birmingham,* 223 Ala. 610, 137 So. 665 (1931); *Alabama Power Co.* v. *City of Scottsboro,* 238 Ala. 230, 190 So. 412 (1939); *Bell County* v. *Lightfoot, Attorney General,* 120 S. W. 381 (Texas, 1911).

which this Court agrees) that the instrument held by Landesbank in this case is a bond, the Court of Claims, speaking through Mr. Justice Reed (Ret.), said:

> "The presence of an indenture and trustee is commonly regarded as differentiating a bond from a promissory note. The latter is a two-party agreement, whereas the presence of a trustee brings a third party into the transaction. Promissory notes are ordinarily used 'when there is a private deal and only one or a very few investors'. Childs, Long-Term Financing 119. On the other hand, an indenture and a trustee are normally used in connection with an issue which is designed to be widely traded, in order to safeguard the rights of the many holders who are often unable effectively to protect themselves and to eliminate the necessity for a separate contract each time the bond is traded. Id., at 91-93; Guthmann & Dougall, supra, at 170-71, 176-77; Baker & Cary, Cases on Corporations 1016 (3d ed. 1959); compare Berle & Warren, Cases on Business Organization 862." 319 F. 2d at 172.

The evidence in this case supports the conclusion that an indenture and a trustee are normally used where there are multiple bondholders, for the reasons stated by Mr. Justice Reed, but that a trustee may sometimes be provided for when there is only a single bondholder, if a trustee furnishes some practical, economic advantage to the lender. The Court has found as a fact that no such economic purpose dictated the use of a trustee in this case, but that a trustee was used in an effort to avoid the provisions of sec. 922(a) (5).

Appendix B

This Court concludes that the commonly understood meaning of the term "bond issue" is not so clear that the purpose of the statute and its legislative history can be ignored. The Court must construe the applicable statutes, in the light of their legislative history, the legislative history of related statutes, and administrative rulings over the years.

2. Purpose and Intent of the Applicable Statutes

a. Legislative History

It appears from the Ship Mortgage Act as a whole, from its legislative history and from the legislative history of the 1916 and 1918 acts, that when the Ship Mortgage Act was adopted in 1920 Congress was primarily interested in building up and preserving an American merchant marine. Congress wished to encourage the investment by United States citizens in United States flag vessels, by way of mortgage loans as well as by equity investment. It also wished the vessels to remain American vessels, available for use by the government in case of war or other emergency. Congress did not object to some foreign money being invested in a vessel, so long as such investment by aliens did not endanger the control of the vessel by the American investors; but Congress wanted to be sure that, if and when it might become necessary, the United States government would be able to control the use of the vessels. Congress was concerned about the actual control of the vessels; it was interested in legal title only so far as legal title involves control, and was interested in mortgages because they involve potential control.

These conclusions are supported by the provisions of the Shipping Act, 1916, the amendments thereto, and the Ship Mortgage Act, 1920, which are set out under the heading

"Applicable Statutes", above.[18] They are also supported by the legislative history of the 1916, 1918 and 1920 Acts, cited under that heading and set out in footnotes 6 to 9 of this opinion.

The legislative history, particularly the comment of the Chairman of the House Committee on Merchant Marine, and Fisheries that "a mortgage has proved to be a common device by which foreign capital has sought to obtain control of American vessels", and the comments set out in footnotes 7 and 9, show the concern which Congress had in the potential control which might be exercised by mortgagees.

The legislative history also shows that the principal purpose of sec. 911(5) is to provide for a situation where there are many bondholders, who ordinarily are not in touch with each other.[14] Where there are numerous bondholders a trus-

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[18]The purpose of those statutes was discussed at length by Judge Soper in *Meacham Corp.* v. *United States,* 4 Cir., 207 F. 2d 535, et seq. (1953).

[14]At the hearings before Congressional Committees on the Bills which resulted in the Ship Mortgage Act of 1920, there was repeated reference to the fact that bond issues were to be floated and that the bondholders would be numerous and scattered. See, e.g., report of the Hearings before the Committee on Commerce, United States Senate, 66th Cong., 2d Sess., relative to the Establishment of an American Merchant Marine, which shows, at p. 962, Senator Nelson said: "This is not like a mortgage to an individual. They contemplate that these mortgages be issued on bonds and sell the bonds to the public." At p. 963, Mr. Campbell, the former counsel for the Shipping Board, who had prepared the Bill for Congress, said: "This bill was drawn with two things in view. The first was in the hope that it might enhance the security value of a mortgage, so that it would be possible to scatter shipping securities among all of the investing people." See also Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 66th Cong. 1st Sess., on H. R. 8422, August 27, 1919, pp. 4, 6, 102, 118, 146, 180, 186; Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 66th Cong., 2d Sess., on H. R. 9419 (revised H. R. 8422 and H. R. 8873), Part V, Friday, February 6, 1920, pp. 10, 11, 27-29, 44; 59 Cong. Rec. 9361; Hearings before the Senate Commerce Committee on the Establishment of an American Merchant Marine, 66th

tee serves various useful functions, some of which are referred to in the reports and debates cited in footnote 14, and in the discussion under the heading: "Ordinary Meaning of 'Bond Issue' ", above; see particularly the passage quoted from Mr. Justice Reed's opinion in the McLouth Steel Corp. case, 319 F. 2d at 172. Where there is a single lender, there is seldom any reason for a deed of trust and the issuance of one or more bonds thereunder, unless the lender contemplates the possibility of selling or transferring a part of his loan. That reason does not exist in this case.

Another purpose of sec. 911(5) may have been to prevent a posible forfeiture of the vessel under other provisions of the statutes, see secs. 808, 961(b), 961(d), if some of the bonds, originally sold to citizens of the United States, should fall in the hands of aliens by inheritance, sale, or otherwise. This possibility is emphasized by a ruling made in 1924 by Chauncey G. Parker, General Counsel of the Shipping Board (the predecessor of Maritime), quoted below, which is the earliest administrative ruling cited or found.

b. *Administrative Rulings*

In his 1924 ruling the General Counsel of the Shipping Board said:

> "It could hardly be claimed that if negotiable bonds should be issued secured by a mortgage upon a vessel and one or more of the bonds should be assigned, the effect of such an assignment if legal would not vest in the assignee of the bond a right under the mortgage upon the vessel, because, as I

Cong., 2d Sess., at pp. 936, 938, 939, 944, 963; Hearings before the House Committee on Merchant Marine and Fisheries, H. R. 8873, 66th Cong., 1st Sess., Part III, at pp. 28, 31; Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 9419, 66th Cong., 2d Sess., p. 52 (1920).

understand the law, the debt secured by the mortgage is the principal thing and the mortgage is entirely incidental to the debt so that while the debt may be assigned and such assignment would carry the mortgage secured by the debt, on the other hand the mortgage could not be assigned if the debt was not so assigned. Is it not therefore clear that Congress had in view the prohibition against an interest and a right under a mortgage being assigned either directly or as incidental to the assignment of the debt? It is easy to imagine that a person not a citizen of the United States might acquire all of the bonds secured by a mortgage. It would thus become the owner of the entire interests under the mortgage and obviously such a transaction is the very one which Congress sought to prohibit."[15]

A similar ruling was made in 1927.[16] The record indicates that these rulings remained in effect until 1949. In its brief, Maritime states: "As hereinabove indicated, there has been no change in the requirement of the Ship Mortgage Act that the mortgagee (including the trustee in the case of a trust deed and bond issue thereunder) be a citizen. This requirement, together with the provision prohibiting the assignment of rights under mortgages to non-citizens without approval and restricting the sale of vessels by the district courts in suits in rem in admiralty to citizens, are clear indications of the infusion into the 1920 Act of the policy of the Shipping Act, 1916, as amended, of isolating American-flag vessels from alien

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[15]Letter of January 2, 1924, from Chauncey G. Parker, General Counsel, addressed to Messrs. Squire, Sanders & Dempsey, The Leader-News Building, Cleveland, Ohio.

[16]Letter of April 6, 1927, from Chauncey G. Parker, General Counsel, addressed to Messrs. Denegre, Leovy & Chaffe, 724 Whitney Central Building, New Orleans, Louisiana.

control. This policy appears to have been recognized as controlling in the two administrative rulings of the United States Shipping Board during the pre-1938 period * * *. These rulings were that mortgage bonds issued under trust deeds constitute rights under mortgages within the meaning of 46 U. S. C. 961(d) and should not, therefore, be sold to non-citizens without approval. In effect it was ruled that bonds held by aliens were *prohibited* rights under mortgage unless approved. These rulings were of course made under circumstances then prevailing and could not have taken into account the governmental policy of facilitating private financing as an alternative to direct Government financing which later developed and came to the fore in the middle 1950s."

The last sentence refers to Title XI, dealing with Federal Ship Mortgage Insurance, which was added to the Merchant Marine Act, 1936, in 1938, and was amended in 1954 (see 68 Stat. 1267, 46 U. S. C. A. 1273, 1274, 1276), and to various rulings and interpretations of the 1916, 1920 and 1936 Acts since 1938. The 1938 and 1954 statutes have been considered by the Court in this case, but the Court has also noted that the 1938 and 1954 statutes did not purport to amend the provisions of the 1920 Act which controls this case.

In the original enactment of Title XI in 1938 (52 Stat. 969), the term "mortgagee" was defined to include "the original lender under a mortgage and his successors and assigns approved by the [United States Maritime] Commission."[17] That definition of "mortgagee" continued until 1954, when the definition was changed to its present form,

[17]The report of the Committee on Merchant Marine and Fisheries states that this definition is "substantially the same as * * * in the National Housing Act." H. R. 1950, 75th Cong., 3d Sess., p. 30 (1938).

namely: "The term 'mortgagee' includes the original maker of a loan secured by a mortgage and his successors and assigns, except that in the case of a mortgage involving a trust indenture and an issue of bonds or notes thereunder it means the trustee designated in such trust indenture and his successors and assigns as trustee, but does not include the holders of the bonds or notes issued under such trust indentures; * * *."[18]

The purpose of the 1954 amendments to Title XI, including the change in the definition of mortgagee, was to stimulate *private* as opposed to *government* financing.

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[18]In commenting upon the change in definition, the Senate Committee stated:

"Unlike the present law, the clean bill, as amended, seeks to encourage lending institutions to bring forth private funds through the medium of trust indentures, thus encouraging a broader basis of private financing." (S. Rep. 1804, 83d Cong., 2d Sess., p. 5 (1954).)

This change in definition was discussed in the Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 8637, 83d Cong., 2d Sess., on April 9, 1954. At these Hearings, Mr. Rudolph S. Hecht presented a prepared statement in his capacity as Chairman of the Committee of American Steamship Lines, which statement also represented the views of the American Merchant Marine Institute. In the technical comments attached to his oral statement Mr. Hecht commented on the definition of "mortgagee" as enacted by the 1954 amendment:

"In the case of most private financing there will be a trust indenture, under which securities will be issued, and a trustee which will be the mortgagee but will not be the lender. The definition of 'mortgagee' has been changed so that it includes such a trustee but excludes the holders of the securities." Hearings on H. R. 8637 before the House Committee on Merchant Marine and Fisheries, 83d Cong., 2d Sess., p. 12 (1954).

In response to a request by Congressman Allen to explain the changes being made in the existing law, Mr. Hecht and his counsel, Mr. Henderson, gave the following testimony at the hearings (p. 16):

"(Mr. Allen) Why is it necessary to change it?

"(Mr. Henderson) Why is it necessary to change it? Because you will not be able to issue securities to the general public through investment bankers, which is one of the things we hope to be able to do, without having the securities issued under a trust indenture with a corporate trustee in the usual form.

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In its brief, the Government states that it has been unable to find in the legislative history of Title XI any specific statement that the Congress intended, in providing for trust indenture financing, either to permit or to exclude investment by aliens, but that there are statements indicating a desire for "a wide dispersion of these securities among the general public in all sections of the country."[19]

The rulings upon which Chemical and Maritime rely are cited in note 20. They indicate that since 1949, and particu-

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"(Mr. Allen) I take it under this law there will be a situation very similar to the issuance of bonds by utilities and a variety of public issues of that sort secured by—

"(Mr. Henderson) That is what we hoped to be able to have.

"(Mr. Hecht) We are trying, Mr. Allen, to make that possible. We are trying, in other words, to open the money markets not only in one direction, let us say insurance companies or commercial banks, but we are trying to make it possible for investment bankers to come in and compete for some of this financing and market it in a way in which of course it has never been done before. That is one of the reasons why the trusteeship becomes so important. But we do believe, or at least some of us do, that it is possible to make a market for these securities among the smaller investors maybe in $1,000 lots; which of course is a new idea, but which would be a good thing for the merchant marine, in my opinion, because the more people that would have an interest in it, the better would be understood the problems of the industry." Op. cit. p. 16.

Geoffrey Azoy, a vice president of Chemical, said: "* * * all we are asking for is a type of security that we can sell to the public, because we are not going to hold many of them. They are going to be sold to the public, and what we want to try to do is get a package that is going to prove attractive to the public that we can sell". Op. cit. p. 59. See also pp. 18, 39, 41, 42, 56, 70.

[19] S. Rep. 1759, 85th Cong., 2d Sess., p. 3 (1958).

[20]a. The forms prescribed by Maritime and its predecessors under 46 U. S. C. A. 838 for the purpose of disclosing the citizenship of mortgagees when offering mortgages for record, have limited their scope to the various types of mortgagees and have omitted reference to bondholders under trust deeds. Maritime Commission's General Order 29, as amended, 4 Fed. Reg. 1621 (1939); Maritime Commission's General Order 61, 11 Fed. Reg. 4804 (1946); Maritime Administration's General Order 61, Revised, as amended, 16 Fed. Reg. 12997 (1951), 17 Fed. Reg. 295 (1952), 18 Fed. Reg. 7494

larly since 1954; Maritime has taken the position that the citizenship of the trustee controls, and has generally either ignored the citizenship of the bondholders or stated that the citizenship of the bondholders is immaterial. Many of those rulings deal with ship mortgage insurance, where the provisions of Title XI, Merchant Marine Act, 1936, as enacted in 1938 and amended in 1954, directly apply. Some of them, however, deal with the 1920 Act, which alone is involved in this case. The latter rulings ignore completely the 1924 and 1927 rulings and the contemporaneous construction and administration of the 1920 Act.

The rulings by the Bureau of Customs have simply given effect to the rulings made by Maritime. More importantly,

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(1953); Maritime Administration's General Order 61, 2d Revision, as amended, 20 Fed. Reg. 1399 (1955), 20 Fed. Reg. 4131 (1955), 22 Fed. Reg. 9249 (1957), 23 Fed. Reg. 7587 (1958), 23 Fed. Reg. 7702 (1958), 24 Fed. Reg. 8465 (1959).

b. The regulations issued by Maritime under Title XI include the statement: "In the case of a mortgage or loan involving a trust indenture, the mortgagee or lender will be deemed to be a citizen if the trustee designated in such trust indenture, and his successors and assigns as trustee, if any, so qualifies as a citizen of the United States." Sec. 298.4(f), Maritime Administration's General Order 29, Revised, as amended, 23 Fed. Reg. 385 (1958), 24 Fed. Reg. 1464 (1959), 24 Fed. Reg. 10257 (1959), 26 Fed. Reg. 4428 (1961), 27 Fed. Reg. 1168 (1962). See also to similar effect the earlier Title XI regulation, Maritime Commission's General Order 29, as amended, 4 Fed. Reg. 1621 (1939).

c. The citizenship affidavit for trustee-mortgagee applicants in Title XI transactions prescribed by Maritime is confined to the citizenship of the trustee-mortgagee and omits reference to bondholders. Maritime Administration's General Order 89, 25 Fed. Reg. 5293 (1960).

d. In response to inquiries, Maritime has advised that the approval of Maritime was not required under 46 U. S. C. A. 808, 835, for the owner to place a mortgage on a vessel documented under the laws of the United States where the mortgage involved a trust deed and a bond issue thereunder and the trustee but not the bondholder was a citizen of the United States. Also, the Chairman, United States Maritime Commission, stated to the Acting Commissioner of Customs that pursuant to 46 U. S. C. A. 922(a) (5) the citizenship of a trustee named in a deed of trust securing a bond issue

it appears that the positions taken in recent years by Maritime have not always been consistent.[21]

Chemical and Maritime argue that great weight should be given to the present administrative interpretations, rather than to the earlier interpretations. The rule, however, is that administrative practice has greater weight when it involves a contemporaneous construction of a statute, because the men charged with the responsibility of setting its machinery in motion were in a good position to know the congressional purpose. A subsequent reversal would not be entitled to such weight, especially if different personnel make the later interpretation. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933); *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 549 (1940). See also Note, *Judical Review of Reversals of Policy by Administrative Agencies*, 68 Harv. L. Rev. 1251, 1257 (1955); *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 408 (1961); *United States* v. *Atlantic Refining Co.*, 360 U. S. 19, 24, n. 4 (1959). This is not a case where the agency's interpretation has been consistent throughout.

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is determined (for the purpose of determining its eligibility as a preferred mortgage) by applying the requirements of 46 U. S. C. A. 802, and such citizenship is not affected by the ownership of bonds secured by such mortgage.

e. The regulations of the Bureau of Customs in dealing with the recordation of preferred mortgages contain no requirement for determination of citizenship of bondholders under trust deeds. 19 C. F. R. 88 (1964).

f. In response to inquiries the Bureau of Customs stated in effect that the citizenship of the trustee and not of the bondholder or bondholders is controlling in the determination of the preferred status of mortgages for recording purposes under the 1920 Act.

g. Maritime has issued no regulations for the approval of the issuance or transfer of bonds to non-citizens as rights under mortgages under 46 U. S. C. A. 961 (d).

h. Maritime has insured numerous mortgages involving trustees, some with public issues of bonds and some with private issues of bonds without any determination of citizenship of bondholders.

[21]For example, on May 20, 1959, in connection with the vessels Wang Buccaneer and Wang Importer, Maritime's General Counsel

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c. *Questions Presented, and Statement of the Ultimate Question to be Decided*

If the earlier administrative rulings were correct, a bond is a right under a mortgage, and cannot legally be transferred to an alien without the approval of the Secretary (acting through Maritime). A fortiori, the original issue of a bond to an alien would also require such approval. It is true that in the *Valiant Power,* supra, Judge Hoffman stated: "In the language of § 911(5), Congress did not suggest that the bond would be invalid if it fell into the hands of persons who do not qualify as citizens under § 802." 214 F. Supp. at 558. It does not appear, however, that Judge Hoffman was asked to consider or did consider the 1924 and 1927 rulings of the General Counsel. Nor does it appear that they were cited to or considered by Judge Solomon in his dictum in Brock v. S. S. Southampton, Civil No. 63-53, D. Ore. (1964).[22]

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gave his opinion that if the citizen holder of a mortgage and mortgage notes assigned the mortgage to a citizen trustee and the notes to an alien, with the understanding that a trust indenture would be entered into between them, the arrangement would amount to the acquisition by an alien of a direct interest in the vessel, forbidden by secs. 808 and 835. On June 10, 1959, he stated that Maritime's approval would not be necessary if the outstanding mortgage were discharged of record, and a trust deed executed with a citizen trustee and bonds issued to the alien. However, on July 31, 1959, the General Counsel advised the Commissioner of Customs, in connection with a proposed mortgage to a trustee securing one note to be held by an alien, that the transaction did not require approval, and that the May 20, 1959, letter was based on the particular facts and circumstances of that case, and was not intended to apply generally to all cases involving trust indentures and notes issued thereunder. It does not appear that Title XI, dealing with insurance, was involved in either case.

[22]In Brock, the Bank of Nova Scotia sought a preferred lien for advances by it to a shipowner to meet payments on a first preferred ship mortgage held by Manufacturers Hanover Trust Company. As an alternative basis for denying the preferred status, the court stated as follows:

"[The Bank of] Nova Scotia is a citizen of Canada. The Ship Mortgage Act of 1920 provides that a preferred ship mortgage may

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It is not necessary to decide in this case whether the transfer to an alien of one or more bonds originally issued to a citizen of the United States requires the approval of the Secretary. That is the question which would affect the marketability of the bonds, about which Chemical and Maritime express concern. But that is not the question in this case. The question here is whether Congress intended the term "bond issue", as used in sec. 911(5), to cover the case of a single lender, an alien, and a trust indenture which gives that alien lender, as the holder of the only bond issued under the indenture, a considerable measure of potential control over the operation of the vessel.[28]

d. *Conclusion*

The provisions of the mortgage indenture in this case, summarized in the statement of "Facts", above, show that although Landesbank did not have all of the powers which an ordinary mortgagee would have, it did have a consider-

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only be held by a United States citizen. 46 U. S. C. A. 922(a) (5). The act further provides that the assignment of rights under a preferred ship mortgage to a non-citizen may be accomplished only with the approval of the Secretary of Commerce. 46 U. S. C. A. 961 (b). Nova Scotia could have arranged an assignment of rights under Manufacturer's mortgage to a United States citizen-trustee. This would have entitled it to a beneficial interest in Manufacturer's mortgage.

* * *

"Where Congress has provided for a specific method or methods by which a non-citizen may protect its interest and gain preferred status, a non-citizen will not be entitled to the benefits of the Act without complying with its provisions."

[28]It is not necessary to decide whether the term "bond issue" is generally understood to include or not to include "private issues", as the latter term was defined by Chemical's witnesses. The answer in each case would require a consideration of the entire transaction, including the terms of the trust indenture. Nor is it necessary to decide whether the various rulings by Maritime and Customs with respect to insurance, recording, etc. are correct.

able measure of potential control. How great a measure of potential control Landesbank had would depend in part upon when and where and under what circumstances Landesbank would attempt to exercise it. A German admiralty court or an admiralty court in some other country might feel that the interests of the lender, the sole bondholder, the equitable mortgagee, should not be limited by the interests of the United States.[24] Certainly, the legislative history quoted in the notes shows that Congressmen in 1920 were worried about this possibility. Although, as Chemical and Maritime argue, some of the general objectives sought by Maritime and by Congress may have changed over the years, that does not justify a change in the proper construction of the 1920 statute; nor indeed does it indicate that Congress has lost its concern over the potential control of the vessels by foreign mortgagees, which is so apparent from the legislative history. Congress has never amended the controlling provisions of the 1920 Act.

The foregoing considerations compel the conclusion that Congress did not intend the term "bond issue" in sec. 911(5) to include the private issue of a single bond to a foreign lender, who could not qualify as a mortgagee under sec. 922(2) (5). Even if the literal meaning of sec. 911(5) were clear, which it is not, it has long been the law of the Fourth Circuit that the literal interpretation of a statute is not permissible if it leads to a result the Congress could not have intended. *United States* v. *21 Pounds, etc.*, 4 Cir., 147 F. 2d 78, 83 (1945).

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[24]E.g. Landesbank might seek to avail itself of the provisions of sec. 4.2 of the indenture, quoted under "Facts" above, which specifically permitted Landesbank to bid for and purchase the vessel. This was one of the points which Congress had in mind in the 1920 debates. See notes 7 and 9, above.

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In Meacham Corp. v. *United States,* 4 Cir., 207 F. 2d 535 (1953), cert. granted 347 U. S. 932 (1953), dismissed per stipulation 348 U. S. 801 (1954), the Court, speaking through Judge Soper, prevented the circumvention of the purpose of secs. 802 and 808 by refusing to approve a device which, although within the letter of the Shipping Act, violated its intent and spirit. In the present case, Landesbank and Chemical have attempted to circumvent the intent and spirit of the Ship Mortgage Act.

This Court concludes that the proper construction of the relevant statutes, in the light of their legislative history and of applicable legal principles, does not permit a foreign lender to obtain preferred status for his mortgage by the device used in this case. Properly construed, the statutes do not grant preferred status to the mortgage from Seatrade to Chemical, Trustee.

The Court therefore holds that the mortgage from Seatrade to Chemical, Trustee, is not a preferred mortgage under sec. 922, entitled to the preferred status given by sec. 953.

Decree

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9637.

CHEMICAL BANK NEW YORK TRUST COMPANY,
Trustee, Mortgagee,

Appellant,

vs.

Steamship WESTHAMPTON (formerly Steamship MONTAUK POINT), her engines, boilers, etc.,

Appellee.

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

April 5, 1965.

SIMON E. SOBELOFF
United States Circuit Judge.

FILED
APR 5 — 1965
MAURICE S. DEAN
CLERK

Decree

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9638.

CHEMICAL BANK NEW YORK TRUST COMPANY,
Trustee, Mortgagee,

Appellant,

vs.

Steamship WESTHAMPTON (formerly Steamship MONTAUK POINT), her engines, boilers, etc.,

Appellee.

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

April 5, 1965.

SIMON E. SOBELOFF
United States Circuit Judge.

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MAURICE S. DEAN
CLERK